No. 896

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

PLAINTIFF IN ERROR,

VS.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased, et Al.,

DEFENDANTS IN ERROR.

HONOLULU PLANTATION COMPANY CASE.

Brief for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

This was a proceeding in eminent domain. Pursuant to instructions from the Attorney General of the United States and from the Secretary of the Navy, proceedings were instituted in the United States District Court for the District of Hawaii to condemn, to the uses and purposes of the national Government, certain lands situate on the shores of Pearl Harbor, in the Island of Oahu, in the District of Hawaii. These lands were intended to serve the purpose of a naval station. Very many persons and corporations were interested in the property, directly and indirectly, and, among others, the Honolulu Planta-

tion Company, the present defendant in error. The issues joined between the Honolulu Plantation Company and the Government were tried before a jury. The verdict was unsatisfactory to the Government; whence this writ of error.

GENERAL STATEMENT OF THE CASE.

This proceeding was intended to condemn for the use of the Government, 561.2 acres of land out of about 8,000 acres of the defendant's estate (Record, pp. 246, 253, 625-6). When the pleadings were originally made up, the cause was tried before a jury, and a verdict rendered. Upon motion for a new trial, this verdict was set aside by the Court, for the reasons stated in the opinion, which forms a part of the motion for a new trial printed in the Record, pp. 41, 508. The cause was again set down for trial, and this second trial commenced on March 3, 1902; and it is against the results of this second trial that the Government now protests.

The cause involved no question concerning the fee in the land; that matter was disposed of upon the trial of the Bishop case, the Estate of Bernice Pauahi Bishop, deceased, the owner of the fee, being one of the parties to the record. All that this second trial was concerned with was the market value of a leasehold interest only, and of a leasehold of 561.2 acres out of 8,000—just about 1-14th. The leasehold interest involved two leases: The first, a paid-up lease, expiring in 1908; and the second not beginning to run until 1908—6 years off. Nor was

this second trial concerned with either detriment or benefit to adjacent lands. No question of that character was involved; no evidence of that character was presented. There was no question made concerning areas. The Government was not seeking the entire estate of the defendant, but only a very insignificant fraction. The manager of the plantation, Mr. Low, fixed the area of the plantation at 8,000 acres; the stipulated area involved in the trial amounted to 561.2 acres, of which only 342 acres were of any value (Record, pp. 297-8, 299, 643); but taking an outside estimate, only about 1-14th of the plantation was involved, the other 13-14ths remaining untouched and undisturbed.

The trial exhibited the antecedent history of this land. It showed the land to have been an uncultivated waste—a range for cattle and goats (Record, Low, 271, 631; Thurston, 375; Ahrens, 356-7, 671). The trial exhibited the physical characteristics of the land, also. The evidence did not set this land upon a pedestal; it was not shown to stand apart, or to be specially preeminent, or to fill the world with wonder at its extraordinary physical perfections. The evidence showed that the shore line of this property was as crooked and misshapen as the body of Richard (Record, White, 107, 543-4). It showed outlying reefs conspicuous all along the sinuous shore, depriving that shore of its adaptability for the reception of ships, and necessitating expensive blasting and dredging (Record, White, 104-8, 124-6, 549-550). It also showed that much of the land itself was waste land; that there were

many marshy places throughout it (Record, Morgan, 369); that between five per cent and ten per cent was marsh (Record, White, 108, 544); and that at least forty per cent of it was rocky (Record, White, 110-111, 545; Low, 295, 641).

The evidence further showed that this land was not homogeneous; that it varied in agricultural availability (Low's yellow slip, Exhibit 14, Record, p. 640-1); that it varies in productiveness (idem); and that it varied in depth of soil (Record, White, 110, 545; Low, 641; Morgan, 369). The water supply was deficient. There was no natural water supply (Record, White, 111, 545); there was only one small, brackish artesian well (Record, Low, 296-7, 642; White, 111, 545-6; Archer, 182). This well was constructed in 1883, long before this defendant in error was even thought of (Record, L. L. McCandless, 193, 594; J. A. McCandless, 227, 619-620); and no proof was made of the market or other value of its user. The evidence showed, also, an absence of permanent improvements (Record, White, 104, 108, 111-2, 541-2, 544, 546; Low, 296-7, 302, 642, 645); and it also showed that nearly one-half of the tract was useless; that, to adopt Low's language, nearly one-half "cannot be cultivated" (Low's yellow slip, Exhibit 14, Record, p. 640-641).

The evidence also exhibited the commercial characteristics of the land. It showed that, until recently, the land was merely a barren waste overrun by cattle, and never had an annual use or yearly value (Record, Archer, 159-160, 583; McCandless, 238-240, 622-3; Low, 300; Thur-

ston, 375; Ahrens, 356-7, 671). It showed that the land has never been cleared or plowed as a whole (Low's yellow slip, Exhibit 14, Record, p. 640-641). It showed that this tract had never been either sowed or cropped (Record, White, 111-2, 546; Archer, 159-160, 583; Low, 296, 641-2; Bolte, 270, 630); and it further showed that this tract had never been devoted to any useful purpose, and had never produced a single dollar of income (Record, Low, 300).

Two theories of value permeated the case. They were formulated in the pleadings, and they recurred constantly throughout the evidence. The theory of the Government was that this tract of land was of very moderate value, indeed: the theory of the defendant was that this tract of land was of most unusual value; and evidence was offered by both sides in line with these two theories. The average valuation of the Government for the leasehold interest proper was $15,428; the average valuation of the Government for the improvements, if any, was $5,890; thus making an average aggregate estimate, on the part of the Government, of $21,318. The average valuation of the defendant for the leasehold proper was $217,419.00; the average valuation of the defendant for the improvements, if any, was $12,500.00; thus making an average aggregate estimate, on the part of the defendant, of $229,919.00. The verdict in the case, however, was not responsive to either of these theories, or to either of these lines of evidence; it placed the valuation of the leasehold proper at $94,000; it placed the valuation of the

improvements, if any, at $8,523.00; thus making an aggregate valuation or estimate, widely differing from the estimate of either of the contending parties, of $102,523.00 In this condition of things, it was only natural that the Government should be dissatisfied.

SPECIFICATION OF ERRORS.

1.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: "Now do you know whether there is a mill belonging to "the plantation a mile above this land?" Bill of Exceptions, Exception No. 2.

And in this behalf, this specification of errors now quotes the full substance of the evidence so admitted:

> "Q. Now, do you know whether there is a mill "belonging to the plantation a mile above this land?
>
> MR. DUNNE: I object to that as not proper "cross-examination, and upon the ground that it is "going into some other land, other than this land, "outside of this land, which we do not know any-"thing about. The witness testified that there was "no mill on this land on July 6th, 1901, and he was "not asked as to any other land—purely the land in "controversy on July 6th, 1901.
>
> " THE COURT.—It is not cross-examination, but

" the Court will allow the witness to answer the ques-
" tion; the objection is overruled.

" Mr. DUNNE.—We except.

"EXCEPTION No. 2.—And said plaintiff and
" petitioner now assigns said ruling as error."

" THE WITNESS.—A. I know of the Hono-
" lulu Plantation mill."

Assignment of Error No. 1.

2.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: " And " that it stands now where it stood on the 6th of July, " 1901?" Bill of Exceptions, Exception No. 3.

And in this behalf, this Specification of Errors now quote the full substance of the evidence so admitted:

" Q. And that it stands now where it stood on the
" 6th of July, 1901?"

" Mr. DUNNE.—I object to that; we are not try-
" ing to condemn any of this land, and I object to the
" introduction on cross-examination of this matter,
" He testified that there was no mill on this land,
" the land involved in this case, as it stood on July
" 6th, 1901; he said nothing about any other land.
" This is objected to as irrelevant and immaterial, and
" not cross-examination or pertinent to any matter

" testified to by the witness on the direct examina-
" tion.

" THE COURT.—Now you can answer yes or no,
" and then explain just as you like, that is, if you
" want to without regard to either counsel.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 3. And said plaintiff and
" petitioner now assigns said ruling as error.)

" THE WITNESS.—A. Yes, sir."

Assignment of Error No. 2.

3.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: "What was the size, Captain, of that mill?" Bill of Exceptions, Exception No. 4.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. What was the size, Captain, of that mill?"

" Mr. DUNNE.—That is objected to as imma-
" terial, irrelevant and not cross-examination. I
" asked nothing about that mill; it is lugging in here
" entirely new matter to which no reference was
" made on the direct examination; it is seeking in the
" midst of a cross-examination to prove their case.

" THE COURT.—Let him answer.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 4. And said plaintiff and pe-
" titioner now assigns said ruling as error.)

" THE WITNESS.—A. It is a large mill."
Assignment of Error No. 3.

4.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: " How far is this Halawa Valley that you have testified " about in your first answer that I asked in regard to it " from the land in question—the nearest portion to the " land in question?" Bill of Exceptions, Exception No. 5.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

Assignment of Error No. 4.

" Q. How far is this Halawa Valley that you have
" testified about in your first answer that I asked in
" regard to it from the land in question—the nearest
" portion to the land in question?

" Mr. DUNNE.—I object to that on the ground
" that it is wholly immaterial, and not proper cross-
" examination, and not addressed to any subject mat-
" ter to which the witness' attention was called on the
" examination in chief; and upon the additional
" ground that he might as well be asked how far
" Paris is from this piece of land.

" THE COURT.—That might be, but the Court
" will allow him to answer how far Halawa Valley
" is from this land.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 5. And said plaintiff and
" petitioner now assigns said ruling as error.)

" THE WITNESS.—A. I should say about a
" mile and one-half, or a mile and a quarter—that is,
" by the road. I do not know, only approximately,
" over how much country down there adjoining this
" land the Honolulu Plantation Company's property
" extends—approximately, I should say that it ex-
" tends over 5,000 or 6,000 acres, and includes the
" land surrounding this land. I think Halawa Val-
" ley is included in the Honolulu Plantation prop-
" erty. I pass through it."

5.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness J. W. Pratt: " Now, " Mr. Pratt, how is this return made up; what kind of a " return is this under the law?" Bill of Exceptions, Exception No. 6.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Now, Mr. Pratt, how is this return made up;
" what kind of a return is this under the law?

" Mr. DUNNE.—I object to that on the ground
" that it is a double question.

" Mr. SILLIMAN.—I will divide it.

" THE COURT.—Let us hear what Mr. Pratt
" says.

" Mr. DUNNE.—We except.

" (EXCEPTION No. 6. And said plaintiff and
" petitioner now assigns said ruling as error.)

" THE WITNESS.—It is made under the head,
" aggregate value of plantations. It is under that
" head—a business for profit."

Assignment of Error No. 5.

6.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: " Now, Mr. " Archer, do you know what that land is capable of yielding in sugar?" Bill of Exceptions, Exception No. 7.

And in this behalf, this Specification of Errors now quoted the full substance of the evidence so admitted:

" Q. Now, Mr. Archer, do you know what that
" land is capable of yielding in sugar?

" Mr. DUNNE.—I object to that upon the ground
" that it is not proper cross-examination, it ap-
" pearing that no crop has ever been raised there.

" THE COURT.—Answer the question, the objec-
" tion is overruled.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 7. And said plaintiff and " petitioner now assigns said ruling as error.)

" THE WITNESS.—Where it is good land, it will " yield 9 or 10 tons per acre in cane; this land is good " for cane. I say two feet deep, dirt, where the dirt " is two feet deep, that is good land. A portion of " this land is waste and rocky—in fact, lava slabs. " I mean to say that land that could be plowed, some " land might be a foot deep, it could be planted with " cane all right to 18 or 20 or 24 inches deep is al- " right all good land. I have gone over the land. I " know the depth of soil upon it. Assuming that it " is 30 inches deep at the upper end and along the " dividing line between that taken by the Government " and Queen Emma's estate line on the other side, " and running from that down to nothing along the " sea shore—there is a strip along the sea shore that " is not arable; it ran from 30 inches at the Queen " Emma line and nothing at the sea shore line; I " think about 300 acres of that portion towards the " sea shore is arable, could be used, or what you " would call good land."

Assignment of Error No. 6.

7.

Said Court erred in denying to said plaintiff and petitioner an opportunity to state its objections to the following question asked on cross-examination from the wit-

ness F .K. Archer: "Do you know whether the Honolulu "Plantation Company had on the 6th of July, 1901, a "water supply that was immediately available to this "land in question?" Bill of Exceptions, Exception No. 8.

And in this behalf, this Specification of Errors now quotes the full substance of the aforesaid action of said Court:

"Mr. SILLIMAN.—Do you know whether the "Honolulu Plantation Company had on the 6th day "of July, 1901, a water supply that was immediately "available to this land in question?

"Mr. DUNNE.—I object to that question on the "ground ——

"THE COURT.—Ask the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 8. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—Yes, sir."

Assignment of error No. 7.

8.

Said Court erred in overruling the objections of said plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: "What was the extent of that water supply?" Bill of Exceptions, Exception No. 9.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Mr. SILLIMAN.—What was the extent of that
" water supply?

" Mr. DUNNE.—I make the same objection, that
" we are getting outside of the land in controversy.

" THE COURT.—Ask the question.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 9. And said plaintiff and
" petitioner now assigns the said ruling as error.)

" THE WITNESS.—I don't know exactly how
" much, how many gallons of water could be pumped
" by those two pumps at Halawa. There is one big
" pump; approximately, about 10,000,000 gallons
" more or less, and the other pump 7 more or less, in
" the other pump."

Assignment of Error No. 8.

9.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony given by said witness F. K. Archer on cross-examination, in response to the question: " What was the extent of that " water supply?" Bill of Exceptions, Exception No. 10.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence refused to be stricken out:

" THE WITNESS.—I don't know exactly how

" much, how many gallons of water could be pumped
" by those two pumps at Halawa. There is one big
" pump; approximately, about 10,000,000 gallons
" more or less, and the other pump 7 more or less
" on the other pump.

" Mr. DUNNE.—I move to strike out this testi-
" mony upon the ground that it appears from his
" answer that this alleged water supply, which is
" not on the land, but so called 'immediately avail-
" able'—whatever that means, springs from some-
" where in the Halawa Valley; it goes out to the old
" thing that your Honor has ruled out heretofore—
" trying to fix the value of this land by something
" else.

" THE COURT.—Immediately available to this
" land, that is the question, and that is what the
" Court ruled on; if it is immediately available to
" this land, they can prove it.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 10. And said plaintiff and
" petitioner now assigns said ruling as error.)

" THE COURT.—I do not think it is cross-exam-
" ination; no, I do not."

Assignment of Error No. 9.

10.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: " Do

" you know whether there is a flowing stream immediately
" available for use upon this land within the lines of the
" Honolulu Plantation Company?" Bill of Exceptions,
Exception No. 11.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> " Mr. SILLIMAN.—Q. Do you know whether
> " there is a flowing stream immediately available for
> " use upon this land within the lines of the Honolulu
> " Plantation Company?
>
> " Mr. DUNNE.—I object to that upon the grounds
> " heretofore stated, and as going outside of the land
> " in controversy.
>
> " THE COURT.—If it is immediately available to
> " this land, the witness can answer the question.
>
> " Mr. DUNNE.—We except.
>
> "(EXCEPTION No. 11. And said plaintiff and
> " petitioner now assigns said ruling as error.)
>
> " THE WITNESS.—I do."

Assignment of Error No. 10.

11.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: "Well,
" now, assuming that the land is in the same condition,
" or substantially in the same condition on the 6th of
" July, 1901, and considering its situation, and the uses

" it might be put to, and the improvements put upon it,
" the plowing that has been done, the clearing that has
" been done, all of its usefulness, the whole property of
" the Honolulu Plantation Company that is available for
" use, in connection with that land, assuming those things,
" what do you say as to the value of the leasehold inter-
" est?" Bill of Exceptions, Exception No. 12.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Well, now, assuming that the land is in the " same condition or substantially in the same condi- " tion on the 6th day of July, 1901, and considering " its situation, and the uses it might be put to, and " the improvements put upon it, the plowing that has " been done, the clearing that has been done, all of its " usefulness, the whole property of the Honolulu " Plantation Company that is available for use, in " connection with that land, assuming those things, " what do you say as to the value of the leasehold " interest?
>
> " Mr. DUNNE.—I object to that question on the " ground that it is incompetent, an incompetent, hy- " pothetical question; it involves matters not estab- " lished by any evidence in this case.
>
> " THE COURT.—Answer the question.
>
> " Mr. DUNNE.—We except.
>
> "(EXCEPTION No. 12. And said plaintiff and " petitioner now assigns said ruling as error.)

" A. I think about one hundred thousand dollars.
" In estimating the value of the defendant's inter-
" ests in this leasehold, I think I took into considera-
" tion the value of the use of the buildings on the
" land."

Assignment of Error No. 11.

12.

Said Court erred in overruling objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. W. Thrum: " Now, Mr. " Thrum, how do you know what this land will produce, " or whether it is good cane land or not?" Bill of Exceptions, Exception No. 13.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Now, Mr. Thrum, how do you know what
" this land will produce, or whether it is good cane
" land or not?

" Mr. DUNNE.—I object to that as wholly imma-
" terial and purely speculative. I object to the ques-
" tion upon the ground it is a double-headed ques-
" tion. I have no objection to the latter part as to
" how he knows that it is cane land. I object to the
" first half, not the latter half.

" THE COURT.—Answer the question, the objec-
" tion is overruled.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 13. And said plaintiff and
" petitioner now assigns said ruling as error.)

" A. I have not testified that it was good cane
" land; it is not good cane land. I know the quality
" of this land from personal examination of it."

Assignment of Error No. 12.

13.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. W. Thrum: "Do " you know the yield of the Halawa Valley?" Bill of Exceptions, Exception No. 14.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Do you know the yield of the Halawa Valley?

" Mr. DUNNE.—I object to the yield of the
" Halawa Valley, on the ground that the yield of the
" Halawa Valley is wholly immaterial, and it not ap-
" pearing that this land ever had any yield.

" THE COURT.—The Court will give a pretty
" wide latitude in the examination of witnesses in re-
" lation to their qualifications to testify as to the
" values.

" Mr. DUNNE.—We except.

"(Exception No. 14. And said plaintiff and peti-
" tioner now assigns said ruling as error.)

" A. I do not."

Assignment of Error No. 13.

14.

Said Court erred in sustaining the objections of said defendant, said Honolulu Plantation Company, to the following question asked by said plaintiff and petitioner from the witness F. W. Thrum: "If a leasehold interest " for 40 years on that particular piece of land, 7 years " of which was fully paid up, the balance of which was " held at 3 1-2 per cent. of the sugar produced provided " it did not fall below $4000.00 per annum for the entire " tract of land including other lands, the first lease in-" cluding 2900 acres, and the second 2122 acres,— if such " a leasehold were offered for sale in the public market, " what would you be willing to pay per acre for it?" Bill of Exceptions, Exception No. 15.

And in this behalf, this Specification of Errors quotes the full substance of the evidence expected:

" A. Not over $20.00 per acre."

Assignment of Error No. 14.

15.

Said Court erred in granting the motion of said defendant, said Honolulu Plantation Company, to strike out from the testimony of the witness F. W. Thrum, the following passage: " I stated that part of my occupation " on the Ewa Plantation was the selection of cane land. " The first case was in 1895, when Mr. Lowrey was the

" manager, and many acres were valuable for the cultiva-
" tion of cane below field 19; that was then the extent of
" the plantation in that direction. I was sent out there,
" and started at field 19, and I cut lines through the al-
" geroba, the glue and the lantana, and was to report the
" land that I considered valuable for sugar cane, and
" after two or three weeks later I had got around this
" tract, field 19, and reported to him the number of acres
" that I considered valuable for sugar cane in that vicin-
" ity. My report was accepted." Bill of Exceptions, Exception No. 16.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so stricken out:

> " THE WITNESS—(to Mr. Dunne)—I stated that
> " part of my occupation on the Ewa Plantation was
> " the selection of cane land. The first case was in
> " 1895, when Mr. Lowrey was the manager, and
> " many acres were valuable for the cultivation of
> " cane below field 19; that was then the extent of the
> " plantation in that direction. I was sent out there
> " and started at field 19, and I cut lines through the
> " algeroba, the glue and the lantana, and was to re-
> " port the land that I considered valuable for sugar
> " cane, and after two or three weeks later I had got
> " around this tract, field 19, and reported to him the
> " number of acres that I considered valuable for
> " sugar cane in that vicinity. My report was ac-
> " cepted.

"Mr. SILLIMAN.—I move to strike it out on the
"ground that it is not proper re-direct cross-examin-
"ation.

"THE COURT.—I do not think it is material;
"let it be stricken out.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 16. And said plaintiff and
"petitioner now assigns said ruling as error.)"
Assignment of Error No. 15.

16.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness J. A. McCandless: "What is the value set on that leasehold interest of 142 "acres (referring to a certain tract of 142 acres on Ford "Island, originally sought to be condemned in this "action, but to which a discontinuance of the action was "subsequently made and filed by plaintiff and petitioner "and ordered by the Court)?" Bill of Exceptions, Exception No. 17.

And in this behalf this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. What is the value set on that leasehold in-
"terest of 142 acres?

"Mr. DUNNE.—I object to this; the records of
"this Court show that this entire matter was settled
"amicably between the Oahu Sugar Company and

" the Government; this is not proper cross-examina-
" tion; it is not directed to any matter testified to
" by the witness in chief; it is not proper cross-
" examination; it has no materiality here."

" THE COURT.—The Court will not rule out that
" testimony, but you can meet it, and you will have to
" meet it if it is met at all, because the Court will
" not rule out any testimony that has a tendency to
" explain any facts that are introduced before the
" jury.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 17. And said plaintiff and
" petitioner now assigns said ruling as error.)

" THE WITNESS.—A. I see from that answer
" of the Oahu Sugar Company that they place a val-
" uation of $200.000 on 142 acres on Ford Island
" that I have been testifying about. I do not know
" what the chemical analysis of the sub-soil of Ford
" Island is; if you were to give me the chemical an-
" alysis of the sub-soil, I do not think I would be able
" to understand it—everything."

Assignment of Error No. 16.

17.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on direct examination from the witness J. A. Low: "Just ex-
" plain the nature of your duties and the nature of your
" experience and the nature of your study on the subject

" (of the growth and manufacture of sugar)?" Bill of Exeptions, Exception No. 18.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Just explain the nature of your duties and " the nature of your experience, and the nature of " your study on the subject?

" Mr. DUNNE.—I object to that question on the " ground that it involves three separate and distinct " questions.

" THE COURT.—Let him answer them.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 18. And said plaintiff and " petitioner now assigns the said ruling as error.)

" A. In connection with my duties as manager of " the plantation, was to direct the general work of " the plantation, employ men, plant cane, harvest it, " employ skilled men, men trained in the different " branches of the work, civil engineering, mechanical " engineering, cultivation, the agricultural portion of " the work, see to the animals, the driving, handling " of horses and mules, bookkeepers and accountants, " chemists, sugar boilers, electricians, and men adapt- " ed to locomotive engineering. The Honolulu Sugar " Company was organized in May, 1898, I think. It "was a corporation organized for the purposes of " cultivating and manufacturing sugar, selling the " sugar produced from the land, purchasing land,

" leasing land, running a mercantile business, and
" running pieces of railroad and pipe-lines, etc.
" These lands are situated in the Ewa and Kona Dis-
" tricts, Island of Oahu. The plantation has about
" 5000 acres situated around and adjoining this land.
" I think that the total acreage rocky places and
" waste land is about 8000 acres; I figured it up for
" the last trial. There are 5000 acres of cane lands."
Assignment of Error No. 17.

18.

Said Court erred in overruling the objections of plaintiff and petitioner to following question asked on direct examination from the witness J. A. Low: " Why not " (that is to say, why was not sugar grown on this land " by the Honolulu Plantation Company)?" Bill of Exceptions, Exception No. 19.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Why not?

" Mr. DUNNE.—I object for the reasons why the
" sugar was not grown on that land as being wholly
" immaterial; it is the fact we deal with; not the
" reasons that he may have for this fact.

" THE COURT.—Ask him the question.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 19. And said plaintiff and
" petitioner now assigns said ruling as error.)

" A. Because we are a new plantation and have
" not been able to get there; all new plantations must
" start from the mill and work out; and we have
" done so."

Assignment of Error No. 18.

19.

Said Court erred in denying motion of plaintiff and petitioner to strike out the answer and testimony given by the witness C. Bolte on direct examination in response to the question: " Now considering the property sought to
" be condemned in the state in which you saw it on the day
" that you viewed it, that it was in substantially the same
" state on the 6th of July, 1901, considering its situation
" and the uses that might be made of it and to which it
" was adapted, and assuming that the plantation has a
" 39 years' lease, seven years' rental of which has been
" paid, and the remaining 32 years is upon a basis of
" a crop-payment; that is, three and a half per cent of the
" sugar produced, and the payment of the taxes, the lease
" including other land, there was a minimum rent upon
" the other land which is not material, and assuming that
" there are 342 acres of cane land in the area sought to be
" condemned, what in your opinion was the value of the
" leasehold interest of that land on the 6th of July, 1901,
" to the Honolulu Plantation Company?" Bill of Exceptions, Exception No. 20.

And in this behalf, this Specification of Errors now

quotes the full substance of the evidence so refused to be stricken out:

"A. $450,000."

Assignment of Error No. 19.

20.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the testimony of said witness C. Bolte given on direct examination relative to the value of this leasehold to a particular individual—to the Honolulu Plantation Company.

Bill of Exceptions, Exception No. 21.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so refused to be stricken out:

"Q. Now considering the property sought to be
"condemned in the state in which you saw it on the
"day that you viewed it that it was in substantially
"the same state on the 6th of July, 1901, considering
"its situation and the uses that might be made of it,
"and to which it is adapted, and assuming that the
"plantation has a thirty-nine years' lease, seven
"years' rental of which has been paid and the re-
"maining thirty-two years is upon the basis of a
"crop-payment, that is 3 1-2 per cent of the sugar
"produced, and the payment of the taxes, the lease
"including other land, there was a minimum rent
"upon the other land which is not material, and as-

" suming there are 342 acres of cane land in the area
" sought to be condemned, what in your opinion was
" the value of the leasehold interests of that land on
" the 6th of July, 1901, to the Honolulu Plantation
" Company?

" A. $450,000.

" Mr. DUNNE.—I move to strike out the testi-
" mony of this witness as to value of this leaseohld
" to the Honolulu Plantation Company, on the
" ground that it is settled law that what this may be
" worth to the Honolulu Plantation Company is not
" a fair test of the market value.

" THE COURT.—The Court will not strike it out.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 20. And said plaintiff and
" petitioner now assigns the said ruling as error.)

" Q. What was the market value?

" A. That is what I said. I have not made up my
" mind; I think it ought to be $250,000 or $300,000.

" THE COURT.—Q. Is there any difference be-
" tween the value and the market value?

" A. Yes, sir. The Honolulu Plantation, it might
" have a greater value to the Honolulu Plantation
" than than to anyone else; if it were put in the
" market, there would be three buyers of this land,
" the Ewa, the Oahu and the Honolulu; but it has a
" distinct value to the Honolulu Plantation.

" CROSS-EXAMINATION.

" Mr. DUNNE.—To save the rights of the Govern-
" ment, I move to strike out the testimony of the wit-
" ness relative to the value of this leasehold to a par-
" ticular individual—to the Honolulu Plantation
" Company—on the ground that the compensation is
" the market value, and not the value which the prop-
" erty may or may not have to a particular individual.

" THE COURT.—The Court will not strike it out.

" Mr. DUNNE.—We except.

" (EXCEPTION NO. 21. And said plaintiff and
" petitioner now assigns said ruling as error.)"

Assignment of Error No. 20.

21.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony of the witness, J. A. Low, during his direct examination, when resumed, in response to the question, "What was the value "of the use of the buildings upon that land for the remain- "der of your term of the lease?" Bill of Exceptions, Exception No. 22.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so refused to be stricken out:

"The value of the use of the buildings upon that
"land for the remainder of our term of the lease was
"$13,500, I believe. The buildings are worth that to

"this company, because I do not believe there would "be a vestige of the buildings left at the termination "of the lease 40 years from now."

Assignment of Error No. 21.

22.

Said Court erred in denying motion of plaintiff and petitioner to strike out the testimony of the witness, J. A. Low, on direct examination, when resumed, relative to the nature and quality of the soil upon the land sought to be condemned to the Honolulu Plantation Company. Bill of Exceptions, Exception No. 23.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so refused to be stricken out:

"A. We have similar soil in the Halawa Valley "that we have raised cane on.

"Mr. DUNNE.—I object to this comparison to out-"side soil. He was asked concerning this soil.

"THE COURT.—He can go on if he will. Let us "hear it.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 23. And said plaintiff and "petitioner now assigns said ruling as error.)"

Assignment of Error 22.

23.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on

direct examination from the witness, J. A. Low: "What "was its (the property sought to be condemned) value on "the 6th of July, 1901?" Bill of Exceptions, Exception No. 24.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. What was its value on the "6th of July, 1901?

"A. To the Honolulu Company?

"Q. Yes, sir.

"Mr. DUNNE.—The same objection; not a proper "test of market value.

"THE COURT.—The same ruling.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 24. And said plaintiff and "petitioner now assigns said ruling as error.)

"A. $400,000."

Assignment of Error No. 23.

24.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the said witness, J. A. Low, during his direct examination, when resumed: "Mr. Low, that portion of the tax return read in evidence "here, showing the statement under the heading, 'Lease- " 'hold interest—return of real estate leases as per Sched- " 'ule B, $50,000—what have you to say in regard to it,

"Mr. Low, by way of explanation?" Bill of Exceptions, Exception No. 25.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Mr. Low, that portion of the tax return read "in evidence here, showing the statement under the "heading, 'Leasehold interest—return of real estate " 'leases as per Schedule B, $50,000'—what have you "to say in regard to it, Mr. Low, by way of explana- "tion?
>
> "Mr. DUNNE.—I object to that. It is a mere am- "biguous question—a sort of question that would per- "mit almost any sort of an answer, hearsay or other- "wise.
>
> "THE COURT.—Answer the question.
>
> "Mr. DUNNE.—We except.
>
> "(EXCEPTION NO. 25. And said plaintiff and "petitioner now assigns said ruling as error.)
>
> "A. Fifty thousand dollars is a transcript of our "books, which show the cost of three rice plantations "that we purchased, the leasehold interest in the three "plantations which we purchased, an area of 113 "acres of cane land."

25.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, W. R. Castle, on direct examination: "What knowledge have

"you of the development of the Plantations in that district "(meaning the district of Ewa)?" Bill of Exceptions, Exception No. 26.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. What knowledge have you of the development of the plantations in that district?
>
> "Mr. DUNNE.—I object to that as entirely irrelevant and immaterial to any issue in this case—as to "the development of other plantations in that district.
>
> "THE COURT.—Answer the question.
>
> "Mr. DUNNE.—We except.
>
> "(EXCEPTION NO. 26. And said plaintiff and "petitioner now assigns said ruling as error.)
>
> "THE WITNESS.—I have been identified with the "plantations there—the Ewa plantation more partic-"ularly—and have known about the development of "all of these plantations, beginning with the Ewa "and coming around to the Honolulu plantation. I "have connection with some of the lands of the Hono-"lulu plantation, but not including this portion now "in controversy—lands that I had occasion to make "over to the Honolulu Plantation Company, not this "particular land; but I am talking about sales to the "Honolulu Plantation Company. I sold——
>
> "Mr. DUNNE.—I object to any statement about "any sales that he may have made, or his connection "with any land except this land.

"THE WITNESS.—I am speaking about this "land.

"Mr. DUNNE.—I am addressing an objection to "the Court.

"THE COURT.—He can testify to any sales that "he made connected with this land.

"Mr. DUNNE.—He has testified already that he "had nothing to do with this land.

"THE WITNESS.—Recently, I said.

"Mr. SILLIMAN.—In times past. I am not ask-"ing for the amount of sales or anything.

"THE WITNESS.—I am still the administrator "of the estate and trustee of the Williams heirs. The "estate sold this land, this particular land, as well as "others; it was sold about 1880. The estate of Wil-"liams had a leasehold in common with Jim Castle, "and it covered this land as well as the other land, "and after some years I sold out the interest of the "estate of Williams to James I. Dowsett. I suppose "the conveyances are of record. I made the convey-"ance in shape and delivered it to Mr. Dowsett. It "covered the district of Halawa from the sea to the "mountains. My impression is that there were "about 3 or 4 thousand acres included in this land."
Assignment of Error No. 25.

26.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said

Honolulu Plantation Company from said witness, W. R. Castle, on direct examination: "Now, Mr. Castle, con-"sidering the property sought to be condemned, the state "which you saw it on the day that you viewed it, and as-"suming that it was in substantially the same state on "July 6, 1901, and taking into consideration the situation "of the land and all the uses that might be made of it, and "assuming that the plantation has a 39-years' lease, and "that 7 years' rental has been paid, and that the rental "for 32 years is on the basis of 3½ per cent of the sugar "produced, and the payment of taxes (the leases covering "other lands in addition to this), and for a minimum ren-"tal, and assuming that there are 342 acres of cane land "of the land sought to be condemned, what, in your opin-"ion, was the market value of the leasehold on the 6th of "July, 1901?" Bill of Exceptions, Exception No. 27.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Now, Mr. Castle, considering the property "sought to be condemned, the state which you saw it "on the day that you viewed it, and assuming that it "was in substantially the same state on July 6th, "1901, and taking into consideration the situation of "the land and all the uses that might be made of it, "and assuming that the plantation has a 39-years' "lease, and that 7 years' rental has been paid, and "that the rental for 32 years is on the basis of 3½ "per cent of the sugar produced, and the payment of

"taxes (the lease covering other lands in addition to "this), and for a minimum rental, and assuming that "there are 342 acres of cane land of the land sought "to be condemned, what, in your opinion, was the "market value of that leasehold on the 6th of July "last?

"Mr. DUNNE.—I object to the question as imma- "terial, irrelevant and incompetent, not justified by "the evidence, and without foundation in this, that "there is no evidence here that this witness does "know what was the market value of such a leasehold "as described in the question, on July 6th, 1901.

"THE COURT.—Let him answer it.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 27. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. I should judge the value "to be about $250,000."

Assignment of Error No. 26.

27.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, W. W. Goodale, on direct examination: "Now, Mr. Goodale, "considering this land sought to be condemned, in the "state in which you saw it on the day that you viewed it, "and assume that it is in substantially the same state or "was on the 6th of July last year, and considering the

"situation of it, and the uses that might be made of the "land and to which it was adapted, and assuming that "the plantation had a 39-years' lease, 7 years' rental of "which has been paid, the rental for 32 years is based "upon 3½ per cent of the sugar produced, the particular "lease covers other land as well as this, has a minimum "basis of rental and includes other land, and assume that "there is 342 acres of cane land, what, in your opinion, "is the market value of the leasehold to the Honolulu "Plantation Company of the land sought to be condemned "on the 6th of July last?" Bill of Exceptions, Exception No. 28.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Now, Mr. Goodale, considering this land "sought to be condemned, in the state in which you "saw it on the day that you viewed it, and assume "that it is in substantially the same state or was on "the 6th of July last year, and considering the situa- "tion of it, and the uses that might be made of the "land and to which it was adapted, and assuming "that the plantation has a 39-years' lease, 7 years' "rental of which has been paid, the rental for 32 years "is based upon 3½ per cent of the sugar produced, "the particular lease covers other land as well as this, "has a minimum basis of rental and includes other "land, and assume that there is 342 acres of cane "land, what, in your opinion, is the market value of "the leasehold to the Honolulu Plantation Company

"of the land sought to be condemned on the 6th of "July last?"

"'Mr. DUNNE.—Objected to as immaterial, irrel- "evant and incompetent; without foundation in this, "that it does not appear that the witness does know "the market value of such property on the 6th of "July, 1901.

"THE COURT.—The objection is overruled.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 28. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. Three hundred thousand "dollars."

Assignment of Error No. 27.

28.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, G. F. Renton, on direct examination: "Now, considering "this property sought to be condemned, in the state that "you saw it on that day that you visited it, and assuming "that it was in substantially the same situation on the "6th of July, 1901, and assuming that there is a lease for "39 years, 7 years of which has been paid up, and the "rental for 32 years is on the basis of 3½ per cent of the "sugar produced—the lease covers other land as well as "this—has a minimum rental, which, however, has no "materiality to the question, the payment of taxes, and

"considering all the uses and purposes to be made of the "land, and the situation in which it exists on that day, "and assuming, further, that there was 342 acres of cane "land within the area sought to be condemned, what, in "your opinion, was the market value of the leasehold in- "terest of the Honolulu Plantation Company on the 6th "day of July last year?" Bill of Exceptions, Exception No. 29.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Now, considering the property sought to be con- "demned, in the state that you saw it on that day "that you visited it, and assuming that it is in sub- "stantially the same situation on the 6th of July, "1901, and assuming that there is a lease for 39 "years, 7 years of which has been paid up, and the "rental for 32 years is on the basis of 3½ per cent "of the sugar produced—the lease covers other land "as well as this—has a minimum rental, which, how- "ever, has no materiality to the question—the pay- "ment of taxes, and considering all the uses and pur- "poses to be made of the land, and the situation in "which it exists on that day, and assuming, further, "that there was 342 acres of cane land within the area "sought to be condemned, what, in your opinion, was "the market value of the leasehold interest of the "Honolulu Plantation Company on the 6th day of "July last year?

"Mr. DUNNE.—Objected to as immaterial, irrele-
"vant and incompetent, and not an accurate and faith-
"ful statement of the evidence, and without founda-
"tion in this, that it does not appear that the witness
"knows what the market value of said leasehold was
"at the time mentioned.

"THE COURT.—The Court will overrule the ob-
"jection.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 29. And said plaintiff and
"petitioner now assigns said ruling as error.)

"THE WITNESS.—A. I should estimate it at
"$250,000 as the value of the land for the leasehold."
Assignment of Error No. 28.

29.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, F. Meyer, on direct examination: "Well, considering the
"property sought to be condemned, as to its location and
"all the uses that could be made of it, and assuming that
"it is substantially in the same situation as it was on the
"6th day of July, 1901, and assuming that there is a lease
"of 39 years, 7 years of which are paid up, and 32 years
"of which are on the basis of 3½ per cent of the sugar
"produced, together with the payment of taxes, and also
"saying that there is a minimum rental; that this 3½ per
"cent should not be less than $4,000 a year; and assuming

"that there are 342 acres of cane land in the area sought "to be condemned, what, in your opinion, was the market "value of that leasehold interest on the 6th of July, "1901?" Bill of Exceptions, Exception No. 30.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Well, considering the property sought to be "condemned, as to its location and all the uses that "could be made of it, and assuming that it is substan-"tially in the same situation as it was on the 6th day "of July, 1901, and assuming that there is a lease "of 39 years, 7 years of which are paid up, and 32 "years of which are on the basis of 3½ per cent of "the sugar produced, together with the payment of "taxes, and also saying that there is a minimum ren-"tal; that this 3½ per cent should not be less than "$4,000 a year; and assuming, also, that there are 342 "acres of cane land in the area sought to be con-"demned, what, in your opinion, was the market "value of that leasehold interest on the 6th of July, "1901?
>
> "Mr. DUNNE.—Objected to as incompetent, irrel-"evant and immaterial, and upon the ground that it "is not a fair and accurate statement, and is not a "competent hypothetical question; and without foun-"dation in this, that it does not appear that the wit-"ness knows the market value on the 6th of July, "1901.

"THE COURT.—Answer the question; objection "overruled.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 30. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. Three hundred thousand "dollars."

Assignment of Error No. 29.

30.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, A. Ahrens, on direct examination: "Now, considering the prop-"erty sought to be condemned, and the situation in which "you saw it on the day that you viewed—that is, in Octo-"ber; and assuming that it was in substantially the same "situation that it was on July 6th, 1901; and after taking "into consideration the use that might be made, the pur-"poses to which it is adapted; and assuming that there is "a 39-years' lease, 7 years of which are paid up, and the "balance of the ter mis upon the basis of 3½ per cent of "the crop; and I will also state for your information that "there is a minimum basis which includes other land—"now, assuming that there was 342 acres of cane land in-"cluded within the 561 acres, what, in your opinion, was "the market value of the leasehold interest on the 6th of "July last?" Bill of Exceptions, Exception No. 31.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. Now, considering the property sought to be "condemned, and the situation in which you saw it "on the day that you viewed—that is, in October; "and assuming that it was in substantially the same "situation that it was on July 6th, 1901; and after "taking into consideration the use that might be "made, the purposes to which it is adapted; and as-"suming that there is a 39-years' lease, 7 years of "which are paid up, and the balance of the term is "upon the basis of a 3½ per cent of the crop, and I "will also state for your information that there is a "minimum basis which includes other land. Now, "assuming that there was 342 acres of cane land in-"cluded within the 561 acres, what in your opinion "was the market value of the leasehold interest on "the 6th of July last?

"Mr. DUNNE.—I object to the question as ir-"relevant and incompetent; and not a proper and "accurate statement of the testimony; and without "foundation, in that it does not appear that the wit-"ness knows what the market value of such a lease-"hold was on July 6th, 1901.

"THE COURT.—The Court will make the same "ruling and allow the testimony in.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 31. And said plaintiff and pe-
"titioner now assigns said ruling as error.)

"THE WITNESS.—A. Two hundred and sev-
"enty-five thousand dollars."

Assignment of Error No. 30.

31

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. T. Crawley on direct examination: "What do you know "about the productive capacity of the soil of this land?" Bill of Exceptions. Exception No. 32.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. What do you know about the productive ca-
"pacity of the soil of this land?

"Mr. DUNNE.—I object to the question as imma-
"terial, irrelevant and incompetent, and calling for
"a mere speculation, and without foundation upon
"which any reasonable person can base an opinion.

"THE COURT.—The objection is overruled.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 32. And said plaintiff and
"petitioner now assigns said ruling as error.)

"THE WITNESS.—A. The soil is very well
"adapted to the growing of cane; it is good soil; the
"chemical composition of it is good and compares

"favorably with other soil in the vicinity that is rais-
"ing good crops of sugar."
Assignment of Error No. 31.

32.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. F. Morgan on direct examination: "Now Mr. Morgan, tak-
"ing into consideration the property sought to be con-
"demned and its location and situation and what can be
"done with the situation as you saw it on the day that you
"viewed it, the uses and purposes that the land can be
"put to; and assuming that the Honolulu Plantation Com-
"pany has a 39 years' lease, 7 years of which were paid
"up and the balance of the term is based upon 3½ per
"cent of the sugar produced from the land, the lease also
"covering other land, having a rental basis; and assuming
"that there was 342 acres of cane land upon the land
"sought to be condemned, what would you saw was the
"market value of that leasehold interest on the 6th of July,
"1901?" Bill of Exceptions. Exception No. 33

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. Now, Mr. Morgan, taking into consideration
"the property sought to be condemned and its location
"and situation and what can be done with the situa-
"tion as you saw it on the day that you viewed it, the

"uses and purposes that the land can be put to; and "assuming that the Honolulu Plantation Company "has a 39 years' lease, 7 years of which were paid up "and the balance of the term is based upon 3½ per "cent of the sugar produced from the land, the lease "also covering other land, having a rental basis; and "assuming that there was 342 acres of cane land upon "the land sought to be condemned, what would you "say was the market value of the leasehold interest "on the 6th of July, 1901?

"Mr. DUNNE.—I object to the question as irrele- "vant, and incompetent, and not a proper or accurate "statement of the evidence; and without foundation "in this, that it does not appear that the witness does "know what the going market value was on July 6th, "1901.

"THE COURT.—Let the witness answer.

"Mr. DUNNE.—I note an exception.

"(EXCEPTION No. 33. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—I put an estimation on the "value of about one hundred and seventy-five thous- "and dollars.

Assignment of Error No. 32.

33.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said

Honolulu Plantation Company from the said witness, J. F. Morgan on re-direct examination: "How many mills "are there in the vicinity of this land?" Bill of Exceptions. Exception No. 34.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. How many mills are there "in the vicinity of this land?

"Mr. DUNNE.—I object to that as irrelevant, in-"competent, immaterial and not proper re-direct ex-"amination.

"THE COURT.—Ask the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 34. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. There is the Honolulu "Plantation Company mill in right adjacent land to "this; the Oahu mill a little further on; then comes "the Ewa and the Waialua. I cannot say positively "how far the Honolulu mill is from this place, but it "looks to me it was within, I should say, about two "miles. I do not know how far away the Oahu mill "is."

Assignment of Error No. 33.

34.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said

Honolulu Plantation Company from the witness L. A. Thurston on direct examination: "Now, considering "the property sought to be condemned, Mr. Thurston, in "the state in which you saw it on the day that you visited "it last, and assuming that it was in substantially the "same state and condition on the 6th of July, 1901, and "taking into consideration the location of the land and "of the uses to which it might be put, and to which it was "adapted; and assuming the plantation has 39 years' "lease, 7 years' rental of which is paid up, and the rental "for 32 years thereof is on a basis of 3½ per cent. of the "sugar produced, and the payment of taxes (I will say "that the leasehold covers other lands, and has a mini-"mum rental of $4000, covering practically 2000 acres); "and assuming that there was 342 acres of cane land in "the area sought to be condemned, what is your opinion "of the market value of that leasehold interest on the 6th "of July, 1901?" Bill of Exceptions, Exception No. 35.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Now, considering the property sought to be "condemned, Mr. Thurston, in the state in which you "saw it on the day that you visited it last, and assum-"ing that it was in substantially the same state and "condition on the 6th of July, 1901, and taking into "consideration the location of the land and of the uses "to which it might be put, and to which it was "adapted; and assuming the plantation has 39 years'

"lease, 7 years' rental of which is paid up, and the "rental for 32 years thereof is on a basis of 3 1-2 per "cent of the sugar produced, and the payment of "taxes (I will say that the leasehold covers other "land, and has a minimum rental of $4000, covering "practically 2000 acres); and assuming that there "was 342 acres of cane land in the area sought to be "condemned, what is your opinion of the market "value of that leasehold interest on the 6th of July, "1901?

"Mr. DUNNE.—I object to that as irrelevant and "incompetent, and not a faithful and accurate state- "ment of the evidence, and without any foundation in "this, that it does not appear that the witness knows "what the market value of this leasehold was on the "6th of July, 1901.

"THE COURT.—Answer the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 35. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. I consider that a conser- "vative market value of that leasehold under the con- "ditions which you stated would be between seven "and eight hundred dollars per acre, for the 342 "acres of cane land."

Assignment of Error No. 34.

35.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness L. A. Thurston on re-direct examination: "What can you say "as to the quality of the soil on the land sought to be con-"demned as to its producing any crop of sugar?" Bill of Exceptions, Exception No. 36.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. What can you say as to "the quality of the soil on the land sought to be con-"demned as to its producing any crop of sugar?

"Mr. DUNNE.—I object to that as irrelevant, im-"material and incompetent, and not proper re-direct "examination.

"THE COURT.—Ask the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 36. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. I consider it first class "cane land."

Assignment of error No. 35.

36.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. R.

Higby on direct examination: "Are you able to state "the value of the use of those buildings for the term of "39 years?" Bill of Exceptions, Exception No. 37.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Are you able to state the value of the use "of those buildings for the term of 39 years?
>
> "Mr. DUNNE.—I object to that as irrelevant and "incompetent and upon the further ground that it "does not call for the market value, but calls merely "for an individual or personal value.
>
> "THE COURT.—The objection is overruled.
>
> "Mr. DUNNE.—We except.
>
> "(EXCEPTION No. 37. And said plaintiff and "petitioner now assigns said ruling as error.)
>
> "THE WITNESS.—If you assume that the build- "ings are valueless at the end of 39 years, I should "say that the life of those buildings would not be 39 "years. I would place the value of the use for the "term of 39 years at what they cost."

Assignment of Error No. 36.

37.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness J. R. Higby on direct examination: "Assuming that their life

"will be finished, what is the value of those buildings?" Bill of Exceptions, Exception No. 38.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Assuming that their life will be finished, what "is the value of those buildings?
>
> "Mr. DUNNE.—The same objection as heretofore "made. (Exception 37).
>
> "THE COURT.—The objection is overruled.
>
> "Mr. DUNNE.—We except.
>
> "(EXCEPTION No. 38. And said plaintiff and "petitioner now assigns said ruling as error.)
>
> "A. I have some notes that I made of the value of "the buildings. I am not exactly able to state the "value without refreshing my recollection from those "notes. The total value is about $11,000—a little "more than $11,000—not including the plumbing and "pipes."

Assignment of Error No. 37.

38.

Said Court erred in refusing to give to said jury the first instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 39.

And in this behalf, this Specification of Errors now quotes the first instruction so refused:

> "I instruct you that private property cannot be "taken for public use without just compensation.

"These are the words of our fundamental law, the "federal constitution; and from them you will ob- "serve that the compensation spoken of must be " 'just.' In this behalf, I charge you that it is your "duty to treat both sides of this case with equal fair- "ness and impartiality, and to avoid giving to any "one side any preferment or advantage denied to the "other. In other words, when dealing with this "matter of compensation, you are to remember that "just compensation means compensation that is just "to both sides, just in regard to the public as well as "to the individual. You are not, for instance, to place "an unduly depreciative valuation upon this prop- "erty because the Government desires it; nor should "you place an exaggerated valuation upon the prop- "erty either because it is private property or because "the Government may want it. Your province is to "proceed and act throughout with even handed fair- "ness and impartiality, treating both sides alike, and "deciding disputed questions solely upon the evidence "received, and within the lines laid down by this "charge."

Assignment of Error No. 38.

39.

Said Court erred in refusing to give to said jury the second instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 40.

And in this behalf, this Specification of Errors now quotes said second instruction so refused:

> "I instruct you that whenever private property "is taken for public purpose, the fair market value of "the property at the time of the taking should be paid "for it; and according to the statute of this Territory "the actual value of the property at the date of the "summons is designated as the measure of valuation "of all property to be condemned; and I charge you "that the date of the summons in this case is July "6th, 1901. It is to this date, therefore, that you are "to look in fixing the value of the property involved "in this case. You are to remember that the ma-"terial matter for consideration is the actual condi-"tion of the property as it stood on that date. It is "to this that you are limited; and beyond this you "cannot go. The prospective or speculative value of "the land from possible improvements, or prospective "uses, cannot be considered by you; the value must be "actual, and not speculative or mere possible value, "nor argumentative value. It is not, therefore, "proper to consider how the property might be im-"proved, or the cost of such improvements; nor can "you consider what the probable value of the land "would be if this or that improvement were placed "upon it; nor can you consider the intention of the "lessee to make such improvements, even though you "should find any such intention to exist. In brief,

"you are to limit your consideration to the actual con-
"dition of this property as it actually stood on July
"6th, 1901."

Assignment of Error No. 39.

40.

Said Court erred in refusing to give to said jury the fourth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 41.

And in this behalf, this Specification of Errors now quotes said fourth instruction so refused:

"Some evidence has been introduced by the Gov-
"ernment showing certain valuations, sworn to, and
"filed with the Assessor, pursuant to the require-
"ments of the Territorial Statute in that regard.
"Upon this subject, I charge you that such sworn
"returns to the assessor are called by the law admis-
"sions against interest; and you say, therefore, and
"indeed it is your duty to do so, consider such sworn
"returns along with the other evidence in the case
"bearing upon the question of market value.

"In this connection, I charge you that the govern-
"ment has introduced here a certain writing of the
"Honolulu Plantation Company, making an annual
"exhibit of its affairs, and showing the assets of the
"defendant on January 1, 1901. I charge you that
"such writing and exhibit comes within the rule just
"stated concerning admissions against interest, and
"that it is your duty to consider such writing and ex-

"hibit in connection with the other evidence in the "case bearing upon the question of market value."

Assignment of Error No. 40.

41.

Said Court erred in refusing to give to said jury the fifth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 42.

And in this behalf, this Specification of Errors now quotes said fifth instruction so refused:

> "You have been permitted to view the premises in "question. The object of this view was to acquaint "you with the physical situation, condition and sur-"roundings of the premises, and to enable you to bet-"ter understand the evidence on the trial. The knowl-"edge which you acquired by the view may be used "by you in determining the weight of conflicting "testimony respecting value and damage, but no fur-"ther. Your final conclusion must rest on the evi-"dence here adduced."

Assignment of Error No. 41.

42.

Said Court erred in refusing to give to said jury the sixth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 43.

And in this behalf, this Specification of Errors now quotes said sixth instruction so refused:

"In cases of this character, much of the testimony "consists in expressions of opinion touching the sub- "ject matter involved. It is your privilege to weigh "the testimony of witnesses whose opinions have "been given, by a reference to the whole situation of "the property and its surroundings, and all the at- "tendant circumstances, and by applying to it your "own experience and general knowledge. The evi- "dence of experts as to values and damages does not "differ in principle from the evidence of experts "upon other subjects. So far from laying aside "their own general knowledge and ideas the jury "may apply that knowledge and those ideas to the "matters of fact in evidence, in determining the "weight to be given to the opinions expressed. While "the jury cannot act in any case upon particular facts "material to its disposition resting in their private "knowledge, but should be governed by the evidence "adduced, they may and should judge of the weight "and force of that evidence by their own general "knowledge of the subject of inquiry; and while the "law permits the opinions of those familiar with "the subject to be given, such opinions are not to be "blindly received, but are to be intelligently exam- "ined, by the jury in the light of their own general "knowledge, giving them force and control only to "the extent that they are found to be reasonable. In "other words, you are not bound by the opinions of

"experts, but you will take their testimony into con-
"sideration, along with all other evidence in the case,
"and award to it such value as in your judgment it
"deserves."

Assignment of Error No. 42.

43.

Said Court erred in refusing to give to said jury the seventh instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 44.

And in this behalf, this Specification of Errors now quotes the said seventh instruction so refused:

"In determining upon which side the preponder-
"ance of evidence is, you are not to be controlled by
"the mere number of witnesses produced, upon either
"side, but you should take into consideration the op-
"portunities of the several witnesses for seeing or
"knowing the things about which they testified,
"their conduct and demeanor while testifying, their
"interest or lack of interest, if any, in the result of
"the suit, the probability or improbability of the
"truth of their several statements in view of all the
"other evidence adduced or circumstances proved on
"the trial, and from all the circumstances determine
"upon which side is the weight or preponderance of
"evidence. In dealing with the testimony, you must
"not forget by whom it was given, the motive of the
"particular witness, if any, the purpose by which he
"is actuated, the partisanship, if any, attributable to

"him. Indeed, any fact or circumstance by which
"his unbiased utterance of truth might be impeded
"or prevented, altogether, must receive your atten-
"tion. Thus, you would not, as men of sense, so
"readily yield to the testimony of a witness whose
"partiality is known or observable, as you would
"have done had the same witness been wholly indif-
"ferent between the parties, and with no partisan mo-
"tive to actuate him—no interest in the result of the
"trial other than the general interest which every
"good citizen ought to feel, that in this, as in all other
"trials, justice be done according to law."

Assignment of Error No. 43.

44.

Said Court erred in refusing to give to said jury the eighth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 45.

And in this behalf, this Specification of Errors now quotes said eighth instruction so refused:

"At arriving at a verdict in this case, you are to
"give to the testimony such weight and effect as in
"your judgment it deserves; but you should not treat
"with such testimony arbitrarily or capriciously, nor
"should you limit your consideration to any isolated
"or fragmentary part thereof. On the contrary, you
"are to take into consideration all the evidence in the

"case, both direct and circumstantial, together with
"all reasonable inferences to be drawn from that evi-
"dence."

Assignment of Error No. 44.

45.

Said Court erred in refusing to give to said jury the ninth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 46.

And in this behalf, this Specification of Errors now quotes said instruction so refused:

> "In considering and deciding the facts in this case,
> "I charge you that the property sought to be con-
> "demned herein is the leasehold interest of the Hono-
> "lulu Plantation Company in and two 561.2 acres of
> "land, and nothing more. In passing upon the facts,
> "you will bear this constantly in mind."

Assignment of Error No. 45.

46.

Said Court erred in permitting to be rendered and in receiving the verdict herein. Bill of Exceptions, Exception No. 47.

And in this behalf, this Specification of Errors now states the grounds of this exception and of this specification of error as follows:

1. Insufficiency of the evidence to justify said verdict.

(a) There is no evidence to support the finding that the market value of the leasehold interest of said Honolulu Plantation Company in the land involved herein is of the sum of $94,000 or any other sum in excess of $75,000.

(b) There is no evidence to support the finding that the market value of all improvements upon said land is of the sum of $8,523, or any other sum.

(c) There is no evidence of the market value of said leasehold interest, or of any market value of said leasehold interest in excess of $75,000.

(d) There is no evidence of the existence upon said land of any improvements, or of the market value, if any, of any such improvements.

2. Said verdict is in opposition to, wholly inconsistent with and not supported by the former adjudication of said Court as to the compensation of said Honolulu Plantation Company:

And in this behalf this Specification of Errors shows that, in and by the judgment of said Court, in the above-entitled action (which said judgment is fully set out in the bill of exceptions herein) between the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on July 25, 1902, adjudicated by said Court not to exceed the sum of $75,000.

3. Said verdict is contrary to and against the law and the evidence:

(a) Because of errors of law occurring during the trial, and excepted to by plaintiff and petitioner, said errors being included within the above and foregoing Specifications of Errors numbered herein from 1 to 45, inclusive.

(b) Because said verdict was made, given and rendered by a jury.

(c) Because said verdict was made, given and rendered without sufficient evidence to support, sustain or justify it; and in this behalf, this Specification of Errors refers to the paragraph herein above marked No. 1.

4. Said verdict is not sustained or justified by either the law or the evidence, or the weight of the evidence, herein:

(a) Because of the insufficiency of the evidence to justify said verdict, as set out in paragraph numbered 1, supra.

(b) Because said verdict is in opposition to, wholly inconsistent with and not supported by the former adjudication of said Court as to the compensation of said Honolulu Plantation Company, as more fully set out in paragraph 2, supra.

(c) Because said verdict is contrary to and against the law and the evidence, as more fully set out in paragraph 3, supra.

(d) Because said verdict was made, given and rendered by a jury.

(e) Because of the errors of law occurring during the trial and herein above assigned and enumerated.

5. Said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation for damages herein, the amount thereof being without the evidence, with no evidence to support it and against the evidence, and against the former adjudication of said Court made July 25, 1902, and herein above referred to.

6. Said verdict is contrary to and against the charge of the Court herein:

(a) Because said jury failed to consider all the testimony as a whole, with all its reasonable inferences.

(b) Because said jury failed to consider the market value of the land involved in its actual condition on July 6, 1901.

(c) Because said jury considered speculative or possible value and not market value.

(d) Because said jury was neither guided or governed by the preponderance of evidence, or by the amount of just compensation to be awarded.

(e) Because said jury gave undue and excessive weight to the expert testimony introduced by said Honolulu Plantation Company.

Assignment of Error No. 46.

47.

Said Court erred in refusing to grant a new trial herein:

(a) Because said cause was illegally tried before a jury, instead of before a Court.

(b) Because said Court, in passing upon plaintiff and petitioner's motion for a new trial of said case, did not weigh all the evidence, and did not exercise its discretion to say whether or not, in its opinion, said verdict was so opposed to the weight of the evidence that a new trial should be granted; and did not accord to said plaintiff and petitioner its right to have all the evidence weighed by said Court, and to have said discretion of said Court exercised in the mode and manner just herein referred to.

Assignment of Error No. 47.

48.

Said Court erred in making, giving, rendering and filing its judgment herein upon and pursuant to said verdict.

Assignment of Error No. 48.

IMPROPRIETY OF JURY TRIAL.

In the Court below, the Government from the commencement to the close of this piece of litigation, was consistent in resisting a trial by jury; but, notwithstanding its objections, protests and exceptions, that form of trial was permitted. It appears from the verified application to correct the Bill of Exceptions, that after the petition had been

filed, and the various defendants began to make their appearance, there were preliminary questions to be disposed of; and in the interest of orderly procedure, it was proper that these preliminary questions should be disposed of before the main body of the litigation was taken up for consideration; and this practice has the approval of so eminent authority as Mr. Lewis, (2 Lewis, Eminent Domain, Sec. 388 et seq.). Of course, the first of these preliminary matters to be disposed of, was the settlement of the pleadings; and when that had been done, the next matter for consideration was the form which the trial should take—whether before the Court, or before a jury. The defendants, and among them the present defendant in error, insisted upon jury trials; their demands were resisted by the Government in each instance; but the Court below thought a jury trial to be the proper form of procedure. In the presentation and argument of these demands for jury trials, each of the defendants participated, as the minutes of the court show, the purpose of all concerned being that this question of jury trial should be, then and there, once and for all, finally determined so far as the lower Court was concerned; the purpose was so to settle this preliminary question as to avoid its recurrence in the future; and it was not in the contemplation of any of those participants that this question of jury trial should be reopened or reargued in the lower Court upon every occasion when the issues tendered by any particular defendant should come on for trial. The proceedings

were regarded as settling this matter of a jury trial; so much so, indeed, that this subject matter was not, thereafter, recurred to by either side of the litigation, not by any of the defendants again formally to demand a jury trial, nor by the Government again formally to object thereto; and this phase of the litigation was, by both sides, regarded as closed. Thereafter, the case of the present defendant in error came on to be heard; and it was the last case to be heard. It was treated, in this matter of jury trial, precisely as its predecessors had been treated; that is to say, nothing was said on either side for the purpose of reopening a question regarded as closed. When the lower Court decided to adopt the mode of procedure demanded by the defendants, he ordered the case of the first defendant on the list, the Estate of Bishop, to be set down for trial before a jury; and to this order, the Government then and there duly excepted, and preserved its exception in an appropriate bill of exceptions; and under all the circumstances, it was not conceived to be necessary to renew this exception, it being believed that one exception would be quite as good as many.

The subsequent history of the matter is detailed in the verified application on file in this court to correct the Bill of Exceptions, an application which fully illustrates the situation and counsel's understanding thereof.

The complaint of the Government in this regard further appears in Assignment of Error No. 46. It is there complained that the lower Court erred in permitting to be

rendered and in receiving the verdict herein, for the reason that said verdict is contrary to and against the law and the evidence, in this, that said verdict was made, given and rendered by a jury; and also for the reason that said verdict is not sustained or justified by either the law or the evidence, or the weight of the evidence, herein, in this, that said verdict was made, given and rendered by a jury. And the complaint of the Government in this respect, further appears in Assignment of Error No. 47, wherein it is complained that the lower Court erred in refusing to grant a new trial herein for the reason that the cause was illegally tried before a jury, instead of before a Court. It would seem that, if the Government be right in the position which it took, the errors complained of were fundamental errors, justifying a reversal of the judgment; for if the local statute designated the Court as the tribunal to determine the issues in this class of cases, the operation of the Act of Congress of August 1, 1888, would deny jurisdiction to refer the disposition of those issues to an essentially distinct and fundamentally different tribunal. If jurisdiction in the premises were vested by law in the Court, no authority existed to justify the delegation of that jurisdiction to a jury.

It is submitted that a vital objection of this kind, involving the character of the tribunal and the nature of its jurisdiction, is one which would be considered by the Court, *sua sponte,* even without any formal exception or assignment of error; it is submitted, in other words, that

the granting of this jury trial, even if "a plain error not assigned," is yet such an error as "the Court, at its option," should "notice" (Rule 11).

Minnesota vs. Hitchcock, 22 Sup. Ct. Rep., 650, 654; 185 U. S., 373.

General Doctrine as to Juries.—It is erroneous to suppose that a jury trial is proper in *all* cases; the rule never was intended to mean that.

Steamboat Co. vs. Foster, 48 Am. Dec., 256-260.
Ex parte Wall, 107 U. S., 265 (27-562).

California Illustrations:

Koppikus vs. State Cap. Com., 16 Cal., 253-5; Condemnation.
Grim vs. Norris, 19 Id. 142; Compulsory Reference in Equity.
Heynemann vs. Blake, 19 Id. 596-7; Condemnation.
Dorsey vs. Barry, 24 Id. 453; Contested Election Case.
Cassidy vs. Sullivan, 64 Id., 266; Divorce.
Curnow vs. B. G. Co., 68 Id., 262; Foreclosure of Mechanic's Lien.
Fish vs. Benson, 71 Id., 428; Ejectment, with equitable defense.
Taylor vs. Reynolds, 92 Id., 573; Common Law Misdemeanors only.

Ex parte Wong You Ting, 106 Id., 296; General Discussion.

In re Wharton, 114 Id., 367; Disbarment; construes "Court."

These few illustrations from a single State sustain the proposition that a jury trial is not proper in all cases; not in all civil cases; and not even in all criminal cases; but only in those cases, whether civil or criminal, in which it was proper at common law.

Indeed, the general doctrine is thus clearly summarized:

"The preservation of the common law right to trial by "jury is guaranteed by the United States Constitution as "well as by the fundamental law of the several States. "These constitutional provisions are construed as preserv- "ing the right in substance as it existed at the time of the "adoption of the Constitution and in the classes of cases "to which it was then applicable."

17 Am. & Eng. Ency., 2d Ed., p. 1097.

And so Brewer, J.:

Walker vs. R. R., 165 U. S., 595-6.

JURIES IN CONDEMNATION CASES.

When not restrained by constitutional limitations, legislative control over the procedure and mode of compensation is unfettered:

1 Lewis, Em. Dom., sec. 245.

Randolph, Em. Dom., sec. 315.
Lynch vs. Forbes, 161 Mass., 308.
R. R. vs. Schmidt, 177 U. S., 236.

In the absence, then, of any special constitutional provision, the legislature may provide such mode as it sees fit for ascertaining the compensation, provided only that the tribunal is an impartial one, and that the parties interested have a nopportunity to be heard; and a Court or Judge, with or without a jury, is an impartial tribunal.

2 Lewis, ubi supra, 313, 365.
Hallinger vs. Davis, 146 U. S., 314.
Backus vs. Fort St. Co., 169 Id., 569.

When we turn to the various State constitutions we find the widest differences in their provisions relating to jury trials in condemnation cases. Some—the greatest number, in fact—do not require or provide for a jury at all; some provide for a "jury" simply, without establishing its character; some provide for "a jury of twelve "men"; some provide for "a jury of twelve freeholders"; some provide for "a jury of twelve or not less than three "commissioners"; some provide for "a common law "jury;" and some provide for "a common law jury on "appeal only."

The following constitutions refer to a jury in some form or other:

1. Alabama: "a jury"; on appeal only; on demand only.

2. California: "common law jury"; waiver of jury permitted; Const. of 1879 only.
3. Colorado: "jury of twelve men, or not less than three commissioners"; waiver permitted.
4. Florida: "jury of twelve men"; no waiver allowed.
5. Illinois: "a jury": no waiver allowed.
6. Iowa: "a jury"; no waiver allowed.
7. Kentucky: "common law jury on appeal only"; no waiver allowed.
8. Maryland: "a jury"; no waiver allowed.
9. Michigan: "jury of twelve men, not less than three commissioners"; no waiver allowed.
10. Missouri: "a jury or not less than three commissioners"; no waiver allowed.
11. Montana: "a jury"; as to private roads only; no waiver allowed.
12. New York: "a jury or not less than three commissioners"; no waiver.
13. North Dakota: "a jury"; waiver allowed.
14. Ohio: "a jury"; no waiver.
15. Pennsylvania: "common law jury"; on appeal only; only in condemnations by municipal corporations.
16. South Carolina: "a jury of twelve men"; right of way cases only; no waiver.
17. South Dakota: "a jury"; no waiver.
18. Washington: "a jury"; unless jury waived.
19. West Virginia: "jury of twelve freeholders"; on demand only.

20. Wisconsin: "a jury"; as to municipal corporations only, and then only as to necessity of taking, but not as to compensation.

The following constitutions do not require or provide any jury at all:

1. *United States* (5th and 14th Amendments).
2. *Arkansas.*
3. *Connecticut.*
4. *Delaware.*
5. *Georgia.*
6. *Idaho.*
7. *Indiana.*
8. *Kansas.*
9. *Louisiana.*
10. *Maine.*
11. *Massachusetts.*
12. *Minnesota.*
13. *Mississippi.*
14. *Nebraska.*
15. *Nevada.*
16. *New Hampshire.*
17. *New Jersey.*
18. *North Carolina.*
19. *Oregon.*
20. *Rhode Island.*
21. *Tennessee.*
22. *Texas.*
23. *Vermont.*

24. *Virginia.*
25. *Wyoming.*

Randolph, Em. Dom., p. 401, et seq.

Not only do the majority of the States fail to require a jury, but the differences among the States are further illustrated by the marked differences among those States themselves which do advert to this subject at all. Thus, limiting one's remarks to the twenty States whose constitutions make any reference to a jury trial at all, we find the following divergent provisions:

First Class of Differences:

"A jury"; 11 States.

"A jury of twelve men"; 2 States.

"Jury of twelve freeholders"; 1 State.

"Jury or not less than three commissioners"; 3 States.

"Common law jury"; 2 States.

"Common law jury on appeal only"; 1 State.

Second Class of Differences:

Jury on demand only; 2 States.

Jury on appeal only; 2 States.

Jury in way cases only; 2 States.

Jury in municipal corporations only; 2 States.

Waiver provided; 6 States.

No waiver provided; 14 States.

Other differences might be pointed out if necessary, but these will suffice for the present. These differences as

among the several States should constantly be borne in mind; because unless there be a similarity between the provisions of other States and the provisions obtaining in this jurisdiction and in this forum, the decisions of those other States are effectually differentiated and without value; for nothing can be more misleading than to follow an authority without reference to the particular language of the constitution or statute under which it was decided.

In further illustration of these differences among the States, in further illustration of the discount to which authorities should be subjected when cited from States whose laws are at variance from those controlling in this forum, I point out that not only do the States differ among themselves as to this matter of jury trial in condemnation cases, but also that the same State, at different periods of its constitutional history, frequently exhibits a marked difference in its constitutional policy concerning this subject-matter. Under such circumstances we find a corresponding change in judicial utterances; the caution which I have just suggested comes again into play; and it becomes important to inquire into the terms of the constitution or statute in force at the time of the decision.

A notable illustration of this will be found in the constitutional history of California.

Const. 1849; Art. I, sec. 3; Art. I, sec. 8.

Hoppikus vs. State Cap. Com., 16 Cal., 249, 253-5; Field, C. J.; 1860.

Heynemann vs. Blake, 19 Id., 579, 596-7; Field C. J.; 1862.

Dorsey vs. Barry, 24 Id., 449, 453-4; 1864.

Const. 1879; Art. I, sec. 14.

San Diego Land Co. vs. Neale, 78 Cal., 63, 72; 1888.

Whatever, then, may be the rule in other States, whatever may be the rule at particular junctures in the constitutional history of any special State, the authorities are uniform in holding that, in the absence of an express constitutional requirement, a jury trial is not a matter of constitutional right; and in the practical administration of their jurisprudence, all such States, as the reports consistently show, invariably indicate their views by rejecting that mode of trial. Not one well-considered opinion can be produced which holds that, in the absence of an express constitutional requirement, it is error to refuse a jury trial in condemnation cases; and this unbroken current of judicial opinion, these practical views as to the propriety of jury trials in cases of this class, should not be without controlling weight.

2 Lewis, ubi supra, sec. 311.

Brannon, XIV Amend., 468.

Scudder vs. D. T. Falls Co., 23 Am. Dec., 756.

Flint River S. Co. vs. Roberts, 48 Id., 178.

Flint River S. Co. vs. Foster, Id., 248; same as Hawaii.

Bonaparte vs. R. R., 1 Bald. (U. S.), 205.

G. F. Mfg. Co. vs. Garland, 25 Fed. Rep., 521; affirmed, 124 U. S., 581.

U. S. vs. Engeman, 46 Id., 176.

U. S. vs. Jones, 109 U. S., 513.

Wurtz vs. Hoagland, 114 Id., 606.

R. R. vs. Humes, 115 Id., 512.

Lent vs. Tillson, 140 Id., 316.

Monongahela Nav. Co. vs. U. S., 148 Id., 312.

Water Co. vs. Brooklyn, 166 Id., 685.

Bauman vs. Ross, 167 Id., 548.

Backus vs. Fort St. Co., 169 Id., 557.

Whiteman's Executrix vs. R. R., 2 Harr. (Del.), 514.

Beekman vs. R. R., 3 Paige, Ch., 45; same as Hawaii.

Livingston vs. New York, 8 Wend., 85.

Willyard vs. Hamilton, 7 Ohio, Part II, p. 111.

Anderson vs. Caldwell, 91 Ind., 451.

People vs. R. R., 3 Mich., star p. 504.

Ames vs. R. R., 21 Minn., 292-3.

Plank Road vs. Pickett, 25 Mo., 537-8.

Koppikus vs. State Cap. Com., 16 Cal., 249.

Heynemann vs. Blake, 19 Id., 579.

Backus vs. Lebanon, 11 N. ~~M.~~ H., 26-7; same as Hawaii.

Dalton vs. North Hampton, 19 Id., 364.

People vs. Smith, 21 N. Y., 598-9.

Gold vs. R. R., 19 Vt., 478.

Johnson vs. R. R., 23 Ill., 130.

Oliver vs. R. R., 9 S. E. (Geo.), 1087-8.

State vs. Heppenheimer, 54 N. J. L. (23 Atl., 664), 268: military condemnation.

State vs. Lyle, 100 N. C., 497.

R. R. vs. Parker, 105 Id., 248.

R. R. vs. Baltzell, 23 Atl. (Md.), 74.

St. Joseph vs. Geiwitz, 148 Mo., 216.

R. R. vs. R. R., 118 Id., 617.

Limited Issues in Condemnation Proceedings.—It will be observed that those authorities point out the limited issues which arise in condemnation proceedings. Adopting the most latitudinarian construction, the possible questions could involve only "adverse or conflicting claims to the property * * *" (Civil Laws, Sec. 1552), or the question of the necessity of the condemnation, or the question of compensation. No other possible questions can arise in this class of cases. Some tribunal must determine these questions, or such of them as are open to judicial inquiry; and my insistence is that, in the language of the statute, the Court, and not a jury, shall determine them.

1. *Adverse or Conflicting Claims.*—But counsel may refer to the subject of adverse or conflicting claims; he may suggest that Section 1552 of the local law relates to conflicting claims, but not to damages; and he may urge that it is, in effect, an interpleader statute. But if there were conflicting claims before the Court, there would be nothing in that circumstance to oust the Court of juris-

diction to hear them. The object of creating this Court, and its judicial functions, involve necessarily the adjudication of conflicting claims; and if the theory referred to were sound, the occupation of the Court would vanish, like Othello's.

Ex parte Wall., 107 U. S., 265.

But in this case, however, there are no adverse or conflicting claims, either to property or compensation. The claim of each defendant is independent and distinct from that of his co-defendant. Each defendant is seeking what is justly due him or his interest, without any invasion of, or encroachment upon, the rights or interests of his co-defendants. Adverse parties make no conflicting claims here to the same property or compensation. All rights, interests or possessions here are subordinate to the true title. No hostile claims of title, right or interest are asserted. The respective interests of the various defendants are recognized by all; and when compensation shall be awarded them, it will be apportioned among them according to their respective rights and interests. Do any of these lessees contest or impeach the title of their landlords? And if they should attempt it, would not the law be swift to estop them? Do any of these lessors create any conflict against their lessees? Does any defendant here set up an adverse claim to the franchise of the Oahu Railway and Land Company? Have we heard of any conflicting or adverse claim against the bonds held by Bishop and Company? In other words, while there may be dif-

ferent or varied interests here, yet those interests are neither adverse nor conflicting.

2 Lewis, ubi supra, Sec. 483; and note 29.

As already hinted, even if there were adverse or conflicting claims, they could not be permitted to interfere with the progress of the condemnation proceedings. "The "march of public improvement cannot thus be stayed by "uncertainties, complications or disputes regarding the "title to property sought to be condemned" (Brown, J., in U. S. vs. Dunnington, infra); and the rule is now firmly settled by the Supreme Court that, if the owner of the land be unknown, or if there are conflicting claims, or if there should be doubt for any reason as to who is entitled to the compensation, the money may be paid into court, a clear title obtained, and the adverse claimants left to litigate their differences elsewhere.

U. S. vs. Dunnington, 146 U. S., 338.
Jones vs. R. R., 41 Fed. Rep., 70.
2 Lewis, ubi supra, sec. 627.
10 Am. & Eng. Ency., 2d Ed., 1195.

Any reference to the doctrine of interpleader would also be unfortunate, for the obvious reason that the underlying thought of that doctrine is that the adverse or conflicting claims shall run against the same right or property. But does Bishop and Company demand here the compensation which may be awarded a tenant of the

Bishop estate? Is the R. R. Co. seeking here the compensation which may be awarded the John II estate? And upon what principle would interference be tolerated by one of these sugar plantations with the compensation due the R. R. Co. for the condemnation of its franchise? It must be obvious that there are no adverse or conflicting claims here, in any accepted sense of the doctrine of interpleader.

Pfister vs. Wade, 56 Cal., 43.
Wells vs. Minor, 25 Fed. Rep., 533.
Standley vs. Roberts, 59 Id., 841.

2. *Necessity of Condemnation.*—In the next place, the authorities establish the proposition that all questions as to the necessity, propriety or expediency of the exercise of the power of eminent domain are exclusively for the legislature to decide. None of such questions are judicial; and the citizen is not entitled to be heard upon the question of necessity. All these questions, then, are purely legislative. They are not judicial; they are not questions for the courts at all; they are not questions for a jury at all. The necessity for this naval station was exclusively for the United States Government to decide. Its decision upon that subject is not open to judicial review; and these defendants are not entitled to have that question litigated, whether before court or jury.

Secombe vs. R. R., 23 Wall., 109.
Broom Co. vs. Patterson, 98 U. S., 403, 406.

Shoemaker vs. U. S., 147 Id., 282.
U. S. vs. G. E. R. R., 160 Id., 688.
Wulzen vs. S. F., 101 Cal., 15; 40 A. S. R., 17.
1 Lewis, ubi supra, sec. 237-8, 277, 158 et seq.
10 Am. & Eng. Ency., 2d Ed., 1052, 1067-8, 1070.
Bonaparte vs. R. R., Baldw. (U. S.), 205.
De Varaigne vs. Fox, 2 Blatch. (U. S.), 95.
U. S. vs. Oregon R. R., 16 Fed. Rep., 524.
Patterson vs. Broom Co., 3 Dillon (U. S.), 465.
2 Lewis, ubi supra, sec. 393, note 32.
U. S. vs. Engeman, supra.
Holt vs. Sommerville, 127 Mass., 410.

3. *Compensation.*—But when we turn to the element of compensation, we find it to be a purely personal claim, entirely independent of the title to the land.

10 Am. & Eng. Ency., 2d Ed., p. 1189.
Tenbrooke vs. Jahke, 77 Pa. St., 392.
Liverman vs. R. R., 114 N. C., 692.

The sole purpose of condemnation proceedings is to fix compensation, just alike to both parties, for the property taken.

O'Hare vs. R. R., 139 Ill., 151.
Lamb vs. Schottler, 54 Cal., 319.
Garrison vs. N. Y., 21 Wall., 196.

But it is precisely upon this question of just compen-

sation that no jury trial is required by the constitution of the United States.

> Bauman vs. Ross, 167 U. S., 593: Gray, J.
> Backus vs. Fort St. Co., 169 Id., 569: Brewer, J.

Chappell vs. U. S., 160 U. S., 499.—In support of their claim for a jury, counsel will, judging from past experience, cite and lay great stress and reliance upon this case; and I shall, therefore, devote a brief space to its consideration.

1. *Nature of the Case.*—The case arose in Maryland, where, as we have seen, the local law required a jury. The proceeding was one to condemn a perpetual easement in a strip of fast land for the purpose of facilitating the lighting of a ship channel. A demurrer was overruled, and a jury ordered, impaneled and sworn. A trial was had upon the question of the assessment of damages. Chappell was present and participated in that trial. Evidence was heard from both sides, and a verdict of $3,500 damages was found.

Then Chappell attacked the jurisdiction of the Court, claiming that he was sued in the wrong county; and also the verdict of the jury, claiming that the amount found was too low; but nowhere did he claim that he did not get a jury trial. His objections, however, were overruled, and the award was confirmed.

Upon his writ of error, he contended that he was entitled to a trial *de novo* before the appellate tribunal; and

that he did not have a jury trial below because not properly brought into Court. In reply, the Attorney General never once discussed the general right of trial by jury, but contented himself with urging an estoppel of Chappell, based upon his participation in the jury trial, which was actually had below.

The opinion on appeal was written by Mr. Justice Gray, to whose subsequent opinions I shall hereafter refer. It illustrates the limited scope of the case. It shows that the large question of the constitutional right to a jury trial under a constitution which does not require it in this class of cases, was not involved or passed upon; and it points out that, aside from the denial of the constitutionality of the Act of 1888, the only other question was whether a Maryland rule would be federally recognized which would entitle Chappell to a second jury trial of the whole case subsequent to the jury trial of the question of damages. (160 U. S., 512.) This latter question was decided adversely to Chappell and the judgment affirmed.

2. *What Was Involved.*—It is thus plain that the Chappell case is not an authority upon the question presented here, for the obvious reason that such question was not involved. Nor will the language of Gray, J., bear the construction that a jury trial is always a matter of right, whatever the language of the local law, or whatever the jurisdiction. He mentions the "general rule" of the Revised Statutes, and then employs the very significant phraseology that "Congress has not itself provided any

"peculiar mode of trial in proceedings for the condemna-"tion of lands for public uses"; and this remark, while strictly so of Maryland, is not so of Hawaii, wherein, as I shall hereafter show, Congress *has* provided an established mode of trial in this class of cases.

Justice Gray then suggests that the Act of 1888 "is not "to be construed as creating an exception to the general "rule of trial by an ordinary jury in a court of record." Manifestly not, because by the terms of that Act, this question of jury or no jury is, in terms, left to the local law for regulation, just as are all other matters or forms of procedure. The Act of 1888 establishes no exception touching this matter of a jury; it is non-committal; it does not operate either way; it neither establishes any rule, nor "creates any exception," relative to jury trials; and it is silent on that subject, when it might have spoken; it provides merely that the local law shall be conformed to, without engrafting either extension or limitation thereon; and it relegates all forms of procedure to the local legislators, whose control over procedure is unfettered, save by constitutional limitations. And Justice Gray very properly said that the double jury theory would be a useless and ill-advised incumbrance upon the administration of justice, that Chappell had the benefit of an ordinary jury trial on the question of damage, and that he was not entitled to a second trial by jury.

This is the whole of the Chappell case. It did not appear that Chappell was denied the trial by jury given

him by the local law, but the contrary appeared, and no question of that character was involved in the appeal. If the local law had denied him a jury trial, and if the constitutionality of that denial had been adjudicated on this appeal, the case might become an authority here; but no such questions were thought of, and the decision is chiefly valuable as illustrating Chappell's voraciousness,—he wanted two jury trials when the local law allowed him only one.

3. *Its Limitations.*—(a) In general:

Black, Interp. Laws, p. 391.

(b) If considered in point, its isolation:

Black, ubi supra, p. 411.

And its isolation is illustrated by the following cases:

Earlier Cases:

G. F. Mfg. Co. vs. Garland, 25 Fed. Rep., 524-5; affirmed, 124 U. S., 581.

Jones vs. U. S., 109 U. S., 513.

Wurtz vs. Hoagland, 114 Id., 606; Gray, J.

Later Cases:

Water Co. vs. Brooklyn, 166 Id., 685; citing Cooley, Const. Lim., star p. 563, quod vide.

Bauman vs. Ross, 167 Id., 548; Gray, J.; and see p. 593.

Backus vs. Fort St. Co., 169 Id., 557. See p. 569.

Even upon the assumption that my opponent's interpretation of this authority is sound, then these later cases, by their want of harmony with the Chappell case, practically overrule it (Asher vs. Texas, 128 U. S., 129).

According to the doctrine of these later cases, all questions of procedure, including trial by jury, are relegated to the judgment of the local legislature; this is the last word of the Supreme Court upon this subject; to this doctrine, Justice Gray subscribes; and since I do not believe that he stultified himself, or that the Court did, I submit that the Chappell case is not a controlling authority on the question here presented.

RATIO DECIDENDI OF FOREGOING AUTHORITIES.—I have pointed out that in the absence of any express constitutional restriction, the authorities almost uniformly hold that, in cases of this class, trial by jury is not a matter of constitutional right, and the line of reasoning upon which these decisions are founded is that, before any of our constitutions were adopted, it had been the policy in America and England to ascertain the compensation to be paid for property taken for public use, by other agencies than a common law jury; that this practice was well-known to the framers of these constitutions and that presumably they did not intend by any general language employed to abrogate a practice so universal and of such long standing, and against which no complaint existed.

2 Lewis, Em. Dom., sec. 311.

The meaning of this idea suggests at once the historical limitations upon the right to trial by jury, as those limitations are established by the authorities.

> "Whenever the right to this trial is guaranteed "by the constitution without qualification or restric- "tion, it must be understood as retained in all those "cases which were triable by jury at the common "law."

Cooley, Const. Limit., 5th Ed., star p. 319.

> "The constitutional provisions do not extend the "right; they only secure it in the cases in which it "was a matter of right before."

Cooley, ubi supra, star p. 410.

> "The right is preserved in substance as it existed "at the time of the adoption of the constitution, and "in the classes of cases to which it was then appli- "cable."

6 Am. & Eng. Ency., 2nd Ed., 974.

> "The preservation of the common law right to "trial by jury is guaranteed by the United States "Constitution as well as by the fundamental law of "the several States. These constitutional provisions "are construed as preserving the right in substance "as it existed at the time of the adoption of the Con-

"stitution and in the classes of cases to which it "was then applicable."

17 Am. & Eng. Ency., 2nd Ed., 1097.

"In view of the way in which the guaranty of trial "by jury is expressed in the seventh amendment and "in the State constitutions, as adverted to above, it "is settled by the courts that the guaranty merely "preserves this right and does not extend it. Con- "sequently, a trial after this method may be claimed "as a matter of constitutional right only in those "cases where it could have been demanded, as of "right, under the common or statutory law which "was in force at the time the constitution was "adopted."

Black, Const. Law, p. 514-5.

These views of the text writers are amply supported by the following authorities, *inter alia*:

Commrs. vs. Morrison, 22 Minn., 178.
Cassidy vs. Sullivan, 64 Cal., 266.
Backus vs. Lebanon, 11 N. H., 19.
Stilwell vs. Kellogg, 14 Wisc., 461.
Byers vs. Com., 42 Pa. St., 89.
Sands vs. Kimbark, 27 N. Y., 147.
McGear vs. Woodruff, 33 N. J. L., 216.
Hagany vs. Cohnen, 29 Ohio St., 82.
Lavey vs. Doig, 25 Fla., 611; 6 So. Rep., 261.
Steamboat Co. vs. Foster, 48 Am. Dec. (Geo.), 248.

Anderson vs. Caldwell, 46 Am. Rep. (Ind.), 613.
Wyncoop vs. Cooch, 89 Pa. St., 451.
Ross vs. Irving, 14 Ill., 171-181.
Tabor vs. Cook, 15 Mich., 322; Cooley.
R. R. vs. Baltzell, 23 Atl. (Md. 1891), 74.
Grim vs. Norris, 19 Cal., 140, 142.
Ex parte Wong You Ting, 106 Id., 297.
Callan vs. Wilson, 127 U. S., 540.
Walker vs. R. R., 165 U. S., 595-6.
Copp vs. Henniker, 55 N. H., 179.
Opinion Judges, 41 Id., 550.
Dane Co. vs. Dunning, 20 Wisc., 221, 228.
Gaston vs. Babcock, 6 Id., 503.
R. R. vs. Ferris, 26 Texas, 588, 595.
Howe vs. Plainfield, 37 N. J. L., 145.
Dillman vs. Cox, 23 Ind., 440.
Allen vs. Anderson, 57 Id., 388.
McMahon vs. Works, 72 Id., 19.
Vaughn vs. Scade, 30 Mo., 600.
State vs. McClear, 11 Neb., 39.
Work vs. State, 59 Am. Dec., 671, 675, 676.
Haines vs. Levin, 51 Pa. St., 414.
Rhines vs. Clark, Id., 96.
State vs. Almy, 67 N. H., 274. "Trial by jury, in "Art. 16 of the Bill of Rights, is common law "language used in its common law sense."

The Common Law as Applied to the Constitution. —The principles established by the foregoing authori-

ties—the principles concerted in the graphic phrase of the New Hampshire Court—teach us that the source of this branch of our constitutional jurisprudence is to be traced to the common law; that in this phrase as in others the Federal Constitution was drafted in a common law atmosphere, by men who were bred in common law doctrines; and that its construction should be conditioned and moulded by common law ideas, principles and modes of thought. It is laid down that a constitution should be construed with reference to the doctrines of the common law (Costigan vs. Bond, 65 Md., 122; 3 Atl., 285); and to no organic act is this rule more applicable than to the Federal Constitution.

In tracing the sources of American constitutional jurisprudence, it is perceived that the system of government established by the Constitution of the United States had no exact historical precedent. In a sense, it was a creation and an experiment. But the framers of the Constitution, although without a model for the whole structure, were guided by the wisdom and experience of the mother country; their action was determined by theories and ideas inherited from the mother country; and our Constitution owes many of its provisions to that of Great Britain, as the latter then stood.

Thus, the idea of a representative government instead of a direct democracy, the principle of majority rule, the necessity of separating the three departments of government, the bicameral system in legislation, the doctrine of

local self-government, and the balancing of centrifugal and centripetal forces,—all these principles, and more, were incorporated into our Constitution as a matter of course, and because they were essential parts of the Anglo-American idea of government. Almost without exception, the great guarantees which secure the natural, civil and political rights of the citizen, and protect him against tyranny or oppression, were derived from the great charters and legislative enactments of Great Britain which had become a fixed part of her constitution, or, in other words, from that common law which the Americans claimed as their natural heritage and shield.

Among these rights, we will notice those of due process of law, trial by jury in certain classes of cases, the benefit of the writ of habeas corpus, security against unreasonable searches and seizures, and many of the rights secured to persons on trial for criminal offenses; and the several States in framing their constitutions, have been guided and influenced by the same doctrines and theories, and by the prevalence of the same political ideas among the people, and also, in later times, by the Federal Constitution.

In illustration of this conception of resort to the common law, and the light which it throws upon our Constitution, it may be pointed out that in the Declaration of Rights put forth by the Continental Congress in 1774, thirteen years prior to the date of the Federal Constitution (Sept. 17, 1787), was the following clause:

"The respective colonies are entitled to the com-
"mon law of England, and more especially to the
"great and inestimable privilege of being tried by
"their peers of the vicinage *according to the course*
"*of that law.*"

And it is observed by Mr. Justice Story:

"The universal principle (and the practice has
"conformed to it) has been that the common law is
"our birth-right and inheritance, and that our ances-
"tors brought hither with them upon their emigra-
"tion all of it which was applicable to their situation.
"The whole structure of our present jurisprudence
"stands upon the original foundations of the com-
"mon law."

1 Story, Const., sec. 159.

The Federal Bill of Rights is contained in the first eight (or ten) amendments; the idea, as well as the name, of a bill of rights, undoubtedly originated in certain great charters of liberty well known in English constitutional history, and particularly the Bill of Rights, passed in the first year of the reign of William and Mary, A. D., 1689; and according to the Supreme Court:

"The object of the first eight amendments to the
"Federal Constitution was to incorporate into it cer-
"tain principles of natural justice which had be-
"come permanently fixed in the jurisprudence of the
"mother country, and therefore the construction

"given to those principles by the English Courts is "cogent evidence of what they were designed to se-"cure, and of the limitations which should be put "upon them."

Brown vs. Walker, 161 U. S., 591.

It is observed by Mr. Justice Bradley, that the common law "is the system from which our judicial ideas "and legal definitions are derived. The language of the "constitution and of many acts of Congress could not be understood without reference to the common law."

Moore vs. U. S., 91 U. S., 270.

And still later it was further observed by the same Court:

"There is one clear exception to the statement that "there is no national common law. The interpreta-"tion of the constitution of the United States is nec-"essarily influenced by the fact that its provisions "are framed in the language of the English common "law, and are to be read in the light of its history. "The code of constitutional and statutory construc-"tion which, therefore, is gradually formed by the "judgments of this court, in the application of the "constitution and the laws and treaties made in pur-"suance thereof, has for its basis so much of the "common law as may be implied in the subject, and

"constitutes a common law resting on national au-
"thority."

Smith vs. Alabama, 124 U. S., 465.

These principles are not without meaning and force; they point the philosophy of the doctrine which I am seeking to impress upon the mind of the Court. If, in the construction of the constitution, the common law, in whose atmosphere it was moulded and by whose principles it is conditioned, should be taken into the account, what shall be said of that canon of the common law, settled from time immemorial, by which the compensation to be paid for property taken for public use, was ascertained by agencies other than a common law jury?

If the common law construction placed on those principles of natural justice now incorporated into the first eight amendments is cogent evidence of their limitations, will this court ignore all the basic ideas of Anglo-Saxon jurisprudence, neglect the teachings of its history, its most learned jurists and its most exalted tribunals, overturn the historical limitations which the common law impressed upon trial by jury, and extend that form of trial to a class of cases in which, at common law, as the foregoing authorities demonstrate, it was never entertained?

As remarked by the Supreme Court, in its latest deliverance upon this subject, there is nothing whatever in the United States constitution which either rejects or requires a jury in this class of cases; neither in the constitution nor in the acts of Congress is any rule on this

subject established; as remarked in the Chappell case, there is nothing exceptional in this behalf in the act of 1888, the obvious reason being that this act relegates the entire subject-matter to the discretion of the local legislature, and directs the Federal Courts to accommodate their procedure to the local regulations; the history of the common law, and the application of its principles to constitutional construction, alike concur in rejecting this mode of trial; and the Supreme Court has formulated a doctrine in perfect conformity with that to which I hope to gain this Court's adherence, when it refers the settlement of all such controversies as this to the local law as construed by the local courts.

Federal Jurisdiction.—Bearing the foregoing principles in mind, let us approach the federal jurisdiction in cases of this class. By virtue of the delegation to the federal government of certain of the sovereign powers vested in the States, the federal government, upon compensation made, has the right to condemn any lands held by private owners, within its borders, for any purpose necessary to the due exercise of the powers so delegated; and all rights of private ownership are qualified by this principle.

Cooley, Const. Lim., 526.
Reddall vs. Bryan, 74 Am. Dec., 550.
U. S. vs. Oregon R. R., 16 Fed. Rep., 524.
Stockton vs. R. R., 32 Id., 17.
New Orleans vs. U. S., 10 Peters, 723.

U. S. vs. Jones, 109 U. S., 513.
10 Am. & Eng. Ency., 2nd Ed., 1142, note 2.
Darlington vs. U. S., 22 Am. Rep., 766.
G. F. Mfg. Co. vs. Garland, 25 Fed. Rep., 521.
McCullough vs. Maryland, 4 Wheat., 429.
Kohl vs. U. S., 91 U. S., 367.
Luxton vs. Bridge Co., 153 Id., 525.

The necessity, occasion, time and manner of the exercise of this power, are purely and wholly legislative questions; and while the question whether a particular use is public or not, is a judicial question, yet "when the use "is public, the necessity or expediency of appropriating "any particular property, is not a matter of judicial cog- "nizance."

Secombe vs. R. R., 23 Wall., 109.
Boom Co. vs. Patterson, 98 U. S., 403, 406.
Shoemaker vs. U. S., 147 Id., 282.
U. S. vs. G. E. R. R., 160 Id., 688.
Wulzen vs. S. F., 101 Cal., 15; 40 A. S. R., 17.
1 Lewis, ubi supra, sec. 237-8, 277, 158 et seq.
10 Am. & Eng. Ency., 2nd Ed., 1052, 1067-8, 1070.
Bonaparte vs. R. R., Baldw. (U. S.), 205.
DeVaraigne vs. Fox, 2 Blatch. (U. S.), 95.
U. S. vs. Oregon R. R., 16 Fed. Rep., 524.
Patterson vs. Boom Co., 3 Dillon (U. S.), 465.

In the exercise of this power, Congress may create a special tribunal for condemnation cases and purposes;

or it may adopt the tribunals of the States; or it may authorize purely common law proceedings in the Courts of the United States. It is indeed settled law, by all the authorities, that this entire subject-matter is committed to the sound discretion of the legislature; and in the absence of direction by Congress as to the tribunal or mode of procedure, an action at common law would lie in the name of the United States in the district in which is situated the land to be condemned. Congress has always shown a disposition to assimilate federal and local procedure:

Criminal Cases, Roe, Fed. Crim. Proc., p. 28.
Civil Cases, R. S., 914.
Condemnation Cases, Act of Aug. 1, 1888.

Congress has, however, legislated upon this subject:

Act of Aug. 1, 1888: 25 Stats. Large, 357; 1 Supp. R. S., 601.
Jones vs. U. S., 48 Wisc., 385.
In re Secty. Treas., 45 Fed. Rep., 396.
U. S. vs. Engeman, Id., 546.
Lumber Co. vs. U. S., 69 Id., 320.
Chappell vs. U. S., 81 Id., 764.
U. S. vs. Tennant, 93 Id., 613.
Luxton vs. Bridge Co., 147 U. S., 337.

This principle of conformity to local law brings me to the Hawaiian law of eminent domain.

The Hawaiian Constitution.—The history of constitutional government in the Hawaiian Islands shows that during 60 years prior to the adoption of the present Organic Law, five constitutions have been in effect:

First: Kamehameha III; Adopted October 8, 1840.

Second: Kamehameha III; Adopted Dec. 5, 1852; Decl. Rights, Acts. 6, 10, 15.

Third: Kamehameha V; Adopted Aug. 20, 1864; Arts. 7, 9, 14.

Fourth: Kalakaua; Adopted July 7, 1887; Arts. 7, 9, 14.

Fifth: Republic; Adopted July 4, 1894; Art. 6, sec. 3; Art. 12.

It was under this last constitution, and two years after it went into effect, that the Hawaiian Eminent Domain Act was adopted:

Session Laws, 1896, Act 45.

Construction of Hawaiian Constitution.—Pursuant to what constitutional limitations, then, was this Eminent Domain Act adopted? The constitution of the Republic did not guarantee trial by jury in *all* cases:

Const., Art. 6, sec. 3.

Nor did it require trial by jury in condemnation proceedings:

Const., Art. 12.

And these constitutional provisions are transcripts of

the corresponding provisions in the Constitution of Kamehameha III, adopted December 6, 1852, and preserved in all succeeding Constitutions.

But in discussing the *ratio decidendi* of those authorities which, under Constitutions similar to that of the Republic, uniformly deny the right to a trial by jury, I endeavored to show the reasoning of the courts to be that, before any of those Constitutions were adopted, it had been the practice, in England and America, to ascertain the compensation to be paid for property taken for public use, by other agencies than a common law jury; that this practice was well known to the framers of those Constitutions; and that they did not intend, by any general language, to abrogate a practice so universal, and of such long standing, and against which no complaint existed.

2 Lewis, Em. Dom., sec. 311.
Murray vs. Hoboken Land Co., 59 U. S., 272.
Davidson vs. New Orleans, 96 Id., 97.

In other words, the judicially ascertained tribunal, at the enactment of the Constitution, is the proper tribunal.

Cruger vs. R. R., 12 N. Y., 198-200.

If, therefore, at the enactment of the Constitution of the Republic, which is itself a transcript of the Constitution of Kamehameha III, a jury was not the recognized tribunal, then it was erroneous to send the issues at bar to a jury for determination.

But the adoption of a constitutional or statutory provision from another jurisdiction involves and carries with it the adoption of the judicial interpretation placed upon it in the courts of its origin.

People vs. Coleman, 60 Am. Dec., 581.
Tel. Co. vs. State Board, 60 Am. Rep., 101.
Atty. Gen. vs. Brunst, 3 Wisc., 787.
Franklin vs. Twogood, 25 Iowa, 520.
Fritz vs. Kuhl, 51 N. J. L., 200.
People vs. Webb, 38 Cal., 477.
Sharon vs. Sharon, 67 Id., 189.
Lux vs. Haggin, 69 Id., 384.
Rouse vs. Donovan, 53 A. S. R., 457.
State vs. Chandler, Id., 483.
Laporte vs. Tel. Co., 58 Id., 359.
Cowhick vs. Shingle, 63 Id., 17.
Oleson vs. Wilson, Id., 639.
Ins. Co. vs. Lewin, 65 Id., 215.
Bell vs. Farwell, 68 Id., 194.
Ives vs. McNicholl, 69 Id., 780.
Stadler vs. Nat. Bank, 74 Id., 582.

And upon the same principle, the reason being much stronger, the repetition, in a later Constitution, of a provision of an earlier Constitution of the same country, is universally held to carry with it the same judicial con-

struction which was placed upon the provision while a part of the earlier Constitution.

Endlich, Interp. Stats., sec. 530.
Sutherland, Stat. Const., sec. 256.
Black, Interp. Laws, pp. 32-3, 369.
Compare, S. P. Logan vs. U. S., 144 U. S., 263; 36 L. Ed., 442.
People vs. Blodgett, 13 Mich., 147.
Saunders vs. St. Louis, etc., 97 Mo., 26.
Houseman vs. Com., 100 Pa. St., 222, 230.
Sharon vs. Sharon, 67 Cal., 189.
Lord vs. Dunster, 79 Id., 485.
People vs. Edwards, 93 Id., 158.
McBean vs. Fresno, 112 Id., 167-8.
Morton vs. Broderick, 118 Id., 483.

But the Supreme Court of Hawaii, in construing the provision of the Kamehameha Constitution, which was afterwards repeated and imported into the Constitution under which this Eminent Domain Act was enacted, distinctly determined that, in condemnation cases, a jury should not be permitted; and this doctrine has never been departed from:

Rooke vs. Nicholson, 1 Haw., 508.
Cited: Minister vs. Glover, 3 Id., 700, 701.
Swan vs. Colburn, 5 Id., 394.

A solemn adjudication of this character will be adhered

to by this Court, especially in view of the high regard in which such judgments are held.

U. S. vs. Engeman, 45 Fed. Rep., 546.
U. S. vs. Tennant, 93 Id., 613.
Olcott vs. Supervisors, 16 Wall., 678.
Taylor vs. Ypsilanti, 105 U. S., 72.
Louisiana vs. Pillsbury, 105 Id., 295.
Anderson vs. Santa Ana, 116 Id., 361.
Backus vs. Fort St. Co., 169 U. S., 557.
Brown vs. New Jersey, 175 Id., 172.
Wilkes vs. Coler, 180 Id., 506.
Shreve vs. Cheesman, 69 Fed. Rep., 790.
The "Robert Lewers" Case, 114 Id., 849.

In other words, the principle of *stare decisis* applies with special force to the construction of Constitutions, and an interpretation once deliberately put upon the provisions of such an instrument should not be departed from without the gravest reasons; and the settled construction put upon a Constitution by its own courts will be accepted as authentic by the courts of the United States.

Black, Interp. Laws, p. 34, 378 and cases cited.

But the Constitution of Hawaii reads: "only on due "process of law and just compensation."

Const. 1894: Republic: Art. 12.

Is trial by jury a part of "due process of law"? It would seem that it is not.

2 Lewis, ubi supra, sec. 365.
Murray vs. Hoboken Land Co., 59 U. S., 272.
Davidson vs. New Orleans, 96 Id., 97.

Trial by jury is not a part of due process of law.

10 Am. & Eng. Ency., 2d Ed., 305.
In re Meador, 1 Abb. (U. S.), 317.
In re Sing Lee, 54 Fed. Rep., 334.
Walker vs. Sauvinet, 92 U. S., 90.
Ex parte Wall, 107 Id., 265.
Hallinger vs. Davis, 146 Id., 314.

Doctrine of Rooke vs. Nicholson Amply Supported by Similar Adjudications Elsewhere:

Koppikus vs. State Cap. Com., 16 Cal., 249, 253-5; per Field, C. J.
Heyneman vs. Blake, 19 Id., 579, 596-7; per Field, C. J.
Steamboat Co. vs. Foster, 48 Am. Dec., 248, 257-260.
Sands vs. Kimbark, 27 N. Y., 147.
Backus vs. Lebanon, 11 N. H., 26-7; 35 Am. Dec., 466.
Hickox vs. Cleveland, 32 Am. Dec., 730, 733.
Beekman vs. R. R., 3 Paige, Ch., 45.

Scudder vs. Trenton Falls Co., 23 Am. Dec., 756, 764-8.

Byers vs. Com., 42 Pa. St., 89.

Construction of Hawaiian Eminent Domain Act.—There is not any question in this case as to the expediency of a jury trial; there is no question here of any discretion to allow such a trial. All questions of this character are foreclosed by the terms of a distinct statute; all considerations of this class are excluded by the operation of a statutory rule. This is not a case of expediency or discretion. It is a case of a statutory Court performing a statutory function; and by the statute, the Court is restrained and limited.

In approaching the construction of this Act, it is to be observed that, in the absence of a constitutional limitation, as in this case, the power of the legislature to establish the mode of procedure in cases of this class is unfettered.

Ogden vs. Saunders, 12 Wheat., 350, 354: Marshall, C. J.

1 Lewis, ubi supra, sec. 245.

Randolph, ubi supra, p. 288 and notes.

Lynch vs. Forbes, 161 Mass., 308.

Whiteman's Executrix vs. R. R., 33 Am. Dec., 420.

Lincoln vs. Colusa, 28 Cal., 666.

Kimball vs. Alameda, 46 Id., 23.

U. S. vs. Jones, 109 U. S., 513.

And from this it necessarily follows that, when the legislature shall have established its forms and modes of procedure, those forms and modes must be strictly adhered to, without extension or enlargement.

Authorities, supra.
Dorsey vs. Barry, 24 Cal., 453-4.
Lux vs. Haggin, 69 Id., 301.

The local legislature, acting pursuant to the Constitution that I have already commented upon, has deliberately adopted its form and mode of procedure in condemnation cases, and has incorporated that special procedure into this statute. The Court, I submit, must take this statute as it is written, without addition thereto or subtraction therefrom. It is to be tested by its own terms. Neither its terms, purpose nor meaning can be extended by implication or construction; and these principles of statutory construction are as old and as firmly settled as the law itself.

Reg. vs. Turk, 10 Q. B., 544: Denman, C. J.
Henderson vs. Sherbourne, 2 M. & W., 239: Tenterden & Abinger, J. J.
U. S. vs. Wiltberger, 5 Wheat., 95: Marshall, C. J.
Melody vs. Reab, 4 Mass., 473: Parsons, C. J.
Com. vs. Martin, 17 Id., 362: Parker, C. J.
Cleveland vs. Norton, 60 Id. (6 Cush.), 380: Shaw, C. J.
U. S. vs. Clayton, 2 Dillon, C. C., 224-6.

Anderson vs. R. R., 42 Minn., 490.
Ex parte McNulty, 77 Cal., 168.
Tynan vs. Walker, 35 Cal., 634.
Knox Co. vs. Martin, 68 Fed. Rep., 789.
City of Eureka vs. Dias, 89 Cal., 469-470.
Shreve vs. Cheesman, 69 Fed. Rep., 692.
Mills vs. Land Co., 97 Cal., 254.
In re Walkerly, 108 Id., 655.
In re Wong Hane, Id., 682.
R. R. vs. Phelps, 137 U. S., 536.
Cline vs. State, 36 Tex. App., 320.
Rich vs. Kaiser, 54 Pa. St., 86, 89.

The local Code of Procedure will be followed:

Bond vs. Dustin, 112 U. S., 604.
U. S. vs. Parker, 120 Id., 89.
Henderson vs. R. R., 123 Id., 61.

But Section 1552 provides that "The *Court* shall have "power to determine all adverse or conflicting claims to "the property sought to be condemned and to the com- "pensation or damages to be awarded for the taking of "the same."

Although the framers of this statute, like the framers of the Constitution under which it was adopted, were thoroughly familiar with the jury system, yet this statute is as silent as that Constitution concerning the use of juries in this class of cases. This statute is limited and confined to the "Court." It wholly fails to provide for

a jury, and by no canon of statutory construction may the word "jury" be read into it. It is the business of the Court, and its legitimate function, to interpret legislation, and every departure from the clear language of a statute is an assumption of legislative power by the Court. No Court possesses authority to supply the omissions of legislation.

Had the legislature wished to overturn the settled policy of Hawaii ever since it had a Constitution; had the legislature written into this section a requirement for a jury, as it could easily have done, as was done in the twenty States to which I referred, a different problem would have been presented; but the legislature did not see fit to insert that requirement into the statute; and its silence in this behalf is pregnant with significance; and it is submitted that it is not within the province of this Court to create a requirement for which the legislature saw no necessity.

But again: In construing the Hawaiian law of Eminent Domain, it may be treated as forming part of one consistent scheme of laws for the government of the community; and hence, the word "Court," as employed in Section 1552, may be explained, and its meaning ascertained and illustrated, by a resort to other sections in which that word is also used:

> Black, Interp. Laws, p. 363.
>
> Wilson vs. Donaldson, 10 A. S. R., 48; 117 Ind., 356.

St. Louis vs. Howard, 41 Id., 630.
Ferrari vs. Bd. Health, 5 So. (Fla.), 1.
Wortham vs. Basket, 99 N. C., 70.
State vs. Sloss, 3 So. (Ala.), 745.
State vs. Donnelly, 19 P. R. (Nev.), 680.
Gartner vs. Cohn, 51 N. J. L., 125.
In re Income Tax, 10 Haw., 317.

A comparative analysis of the various sections of the Civil and Penal Laws shows that the phrase, "the Court," as used in Civil Laws, Sec. 1552, was not intended to mean or include a jury, and was intended to mean the presiding Judge only. In these laws, the intrinsic opposition between the terms "Court" and "Jury" is very strongly marked; and the terms are employed to denote independent ideas.

Civil Laws, page 109, Section 199.
Civil Laws, page 125, Section 240.
Civil Laws, page 140, Section 272.
Civil Laws, page 142, Section 277.
Civil Laws, page 154, Section 315; compare these proceedings with Eminent Domain.
Civil Laws, page 164, Section 344, et seq.; compare Section 347.
Civil Laws, page 216, Section 491.
Civil Laws, page 254, Section 605.
Civil Laws, page 372, Sections 915-6.
Civil Laws, page 427, Section 1043.
Civil Laws, page 432, Section 1069.

Civil Laws, page 443, Sections 1095-9.

Civil Laws, page 485, Section 1221; Court and Judge synonymous.

Civil Laws, page 487, Section 1227; Court and Judge synonymous.

Civil Laws, page 492, Section 1244.

Civil Laws, page 493, Section 1246; Expressio unius exclusio alterius.

Civil Laws, page 493, Section 1247.

Civil Laws, page 494, Section 1252.

Civil Laws, page 496, Section 1260.

Civil Laws, page 497, Sections 1268-9, 1270.

Civil Laws, page 498, Section 1274.

Civil Laws, page 499, Section 1276; "Court *or* Jury": in opposition.

Civil Laws, page 499, Section 1277.

Civil Laws, page 514, Sections 1319, 1320.

Civil Laws, page 515, Sections 1322, 1325.

Civil Laws, page 517, Section 1328; "Court" and "Jury" opposed.

Civil Laws, page 518, Section 1331; "Court" and "Jury" opposed.

Civil Laws, page 520, Sections 1337-8; "Court" and "Jury" opposed, and see Section 1349.

Civil Laws, page 522, Section 1346; "Court" and "Jury" opposed.

Civil Laws, page 523, Section 1352; "Court" and "Jury" opposed.

Civil Laws, page 523, Section 1355; "Court" and "Jury" opposed: "Court" defined.

Civil Laws, pages 524-6, Section 1356; "Court" and "Jury" opposed: compare with Section 1362.

Civil Laws, page 553, Section 1442: "Court" and "Jury" opposed.

Civil Laws, page 555, Sections 1443-4; "Court" and "Jury" opposed: "Court," "Judge" and "Jury."

Civil Laws, page 590, Section 1530; suppose this suit brought by Hawaiian Government.

Civil Laws, page 602, Section 1565; suppose this suit brought by Hawaiian Government.

Civil Laws, page 613, Section 1609.

Civil Laws, page 615, Section 1616.

Civil Laws, page 667, Section 1777, et seq.; no jury here.

Civil Laws, page 684, Section 1820.

Civil Laws, page 786, Section 1.

Penal Laws.—Generally, throughout the Penal Laws, punishments are directed to be imposed by "the Court"; but this clearly does not mean that "a jury" is to assist in the exercise of this function.

Penal Laws, pages 212-3, Section 572: "Court or Jury."

Penal Laws, page 215, Section 576.

Penal Laws, page 228, Section 617; "Court" and "Jury" opposed.

Penal Laws, page 238, Section 648.

Penal Laws, page 239, Section 650; "Court" and "Jury" opposed.

Penal Laws, page 240, Section 652; "Court" and "Jury" opposed.

Penal Laws, page 240, Section 653; "Court" and "Jury" opposed.

Penal Laws, page 241, Section 655; "Court" and "Jury" opposed.

Penal Laws, page 242, Section 657; "Court" and "Jury" opposed.

Penal Laws, page 243, Section 662; "Court" and "Jury" opposed.

Penal Laws, page 244, Section 664; "Court" and "Jury" opposed.

Penal Laws, page 248, Section 675; "Court" and "Jury" opposed.

Penal Laws, page 249, Section 682; "Court" and "Jury" opposed.

Penal Laws, page 242, Section 661; "Court" and "Jury" opposed.

A California analogy:

Code Civ. Proc., sec. 297.

In re Wharton, 114 Cal., 370.

S. P.: Ex parte Wall, 107 U. S., 265.

Nor can defendants derive any comfort from the general language contained in Civil Laws, sections 1246, 1216, and 1232,—particularly section 1232.

Because: 1. Section 1232 is limited to parties plaintiff.

2. When read with section 1552, sec. 1232 establishes a general rule only, while Sec. 1552 establishes a special rule for this class of cases, and thus controls the situation:

Sutherland, Stat. Const., sec. 153, 157-8

3. Section 1552 being the later section both in position and in time, it necessarily controls.

Black, Interp. Laws, p. 363.
Sutherland, Stat. Const., sec. 158, note 3; sec. 160.
Bank vs. Patty, 16 Fed. Rep., 751.
Haritwen vs. The Louis Olsen, 52 Id., 652.

4. The object of the Eminent Domain Act is to establish a general scheme of procedure for this class of cases; when it speaks, its voice is controlling, and all other enactments must give way; and under the express terms of Section 1560, the ordinary procedure obtains only when Chap. 99 is silent; but by Sec. 1552, it is "otherwise expressly provided."

U. S. vs. Tynen, 11 Wall., 88.
U. S. vs. Claflin, 97 U. S., 546.
In re Neagle, 39 Fed. Rep., 855.

But again; trial by jury is further improper because

this Eminent Domain Act has provided an adequate remedy by submitting the assessment of damages to the Court; and this remedy is exclusive:

Gold vs. V. C. R. R., 19 Vt., 478; defining "Court."
Herring vs. Gulick, 5 Haw., 57.
Compare; Rhines vs. Clark, 51 Pa. St., 96.

But again; under this statute, there can be no delegation of judicial functions to a jury. The right of eminent domain is an attribute inherent in and necessary to sovereignty; and since all condemnation Statutes must be strictly pursued, it follows that where a sovereignty, by or through a legislative enactment, expressly designates a specific tribunal for condemnation cases, that tribunal alone has jurisdiction; it must hear and determine the case; it cannot delegate its functions to some other tribunal not named in the Act; and in this respect, as in all others, the Act must be strictly followed. In this Statute, the "Court" is the only tribunal named; in cases of this class, in the Hawaiian Islands, the term "Court" never has included "jury," local constitutional policy and judicial decision having uniformly rejected juries; and any delegation of the functions of the court to a jury would be unauthorized and would vitiate the validity of the entire proceeding.

Dorsey vs. Barry, 24 Cal., 453-4.
In re Buffalo, 139 N. Y., 422.

As to settled policy of the State and prior judicial decisions, see;

Waddell vs. Com., 84 Ky., 267.
Barbour vs. Louisville, 83 Id., 95.
Conant vs. Conant, 10 Cal., 252.
Ferris vs. Cooner, 11 Id., 176.
Knowles vs. Yates, 31 Id., 83.
Baltimore vs. State, 15 Md., 376.
State vs. Sorrell, 15 Ark., 664.
Maddox vs. Graham, 2 Metc. (Ky.) 56.

And finally, I may be permitted to add, in conclusion, that the local procedure in eminent domain cases has been sanctioned by Congress, not merely in the Act of 1888, but also in the Organic Act of the Territory. It has been observed that the power of eminent domain, being an incident of sovereignty, does not exist in any territorial government unless granted by Congress (1 Lewis, sec. 237); but, waiving for the present the question of Congressional grant, the limitations here suggested could stay the hands of the territorial government only, and could operate no restriction upon the general government. The general government proceeds under the Act of 1888; and that Act, after providing that land for public uses may be condemned by judicial process, after vesting jurisdiction in the circuit and district courts, and after maintaining a most significant and eloquent silence concerning trial by jury in this

class of cases,—a mode of trial which Congress could easily have written into the Act had it been believed proper,—then proceeds to provide in Section 2, as follows;

> "The practice, pleadings, forms and modes of pro-"ceedings in causes arising under the provisions of "this Act shall conform, as near as may be, to the "practice, pleadings, forms and proceedings exist-"ing at the time in like causes in the courts of "record of the State within which such circuit or "district courts are held, any rule of the court to "the contrary notwithstanding."
>
> Act of Aug. 1, 1888; 25 Stats. L., 357.

This Act which was intended by Congress to have some effective meaning and operation, was directed to all circuit and district courts wherever sitting; Congress understood perfectly that their jurisdiction, notably those of the ninth circuit, included territories; and by the terms of Sec. 86 of the Organic Act, the lower Court is placed upon an equivalent footing with all other circuit and district courts. And, indeed, it may be said that the local judicial system is unique and peculiar; it is assimilated to, and closely approximates, that of a fully developed state; and thus, upon various grounds, good reason exists why this general Act of 1888 should obtain here.

S. S. Co. vs. Hind, 108 Fed. Rep., 113. 116.

And when we turn to the Newlands Resolution, we find Congress indicating in the plainest way a set purpose to continue in force the local laws:

> "The municipal legislation of the Hawaiian Is-"lands * * * not inconsistent with this Resolu-"tion, nor contrary to the Constitution of the United "States * * * shall remain in force until the "Congress of the United States shall otherwise de-"termine."

30 U. S. Stats., 750.

But Congress has not "otherwise determined" in relation to this matter of jury trial in this class of cases; and the denial of a jury trial in cases of this class is not "contrary" to the "Constitution of the United States."

> "By the constitution of the United States, the "estimate of the just compensation for property "taken for the public use, under the right of eminent "domain, is not required to be made by a jury; but "may be intrusted by Congress to commissioner ap-"pointed by a court, or by the executive, or to an "inquest consisting of more or fewer men than an "ordinary jury."

Per Gray, J., in Bauman vs. Ross, 167 U. S., 548 593.

"The constitution of the United States does not "forbid a trial of the question of the amount of com- "pensation before an ordinary common-law jury; "or require; on the other hand; that it must be be- "fore such a jury. * * * These are questions "of procedure which do not enter into or form the "basis of fundamental right. All that is essential "is that in some appropriate way before some prop- "erly constituted tribunal; inquiry shall be made as "to the amount of compensation; and when this has "been provided there is that due process of law "which is required by the Federal Constitution."

Per Brewer, J., in Backus vs. Fort St. Co., 169 U. S., 557, 569.

The Court sitting without a jury, is, however, a "properly constituted tribunal," and is an impartial one (2 Lewis, sec. 313); and there is nothing in our contention at all inconsistent either with the Newlands Resolution or with the Federal Constitution. In the Newlands Resolution Congress indicated its policy to continue in force the local laws, subject to certain qualifications which, we have seen, are irrelevant here; and when we turn to the Organic Act itself, we find Congress making those laws its own.

Organic Act, secs. 1, 5, 6, 7, 75, 81, 83, 86.

By force of these provisions. the local Eminent Do-

main Act becomes of equal dignity and binding power with the Organic Act, of which it is made a part; upon annexation, this Eminent Domain Act ceased to have any force, ex proprio vigore; the government which enacted it, ceased to be; the Act remained alive only through the will of Congress; and it became a regulation, an enactment, of Congress itself, and, like all Congressional enactments, drew its vitality from the will of Congress. The procedure which it establishes is, therefore, a procedure adopted by Congress; and as such, must be as strictly conformed to as if specially made the subject of a specific congressional enactment. Over the territories, Congress is supreme, under the constitution; its enactments in reference thereto, whether as general Organic Acts or as adopting local laws, particularly where the adoption is part and parcel of the Organic Act, are binding and obligatory on all alike; and "the "organic law of a territory takes the place of a constitu-"tion as the fundamental law of the local government."

National Bank vs. Yankton, 101 U. S., 129.
Mormon Church Case, 136 Id., 1.
Downs vs. Bidwell, 181 Id., 779.

"State Laws, when adopted by Congress, become "obligatory upon the Federal Courts."

Perkins vs. Watertown, 19 Fed. Cas., 255.
Cited: Jewett vs. Garrett, 47 Fed. Rep., 631.

And see:

23 Opinions Atty. Genl., 540.

In other words, I may invoke here the principle that where Congress, by statute, adopts a course of procedure, or legislates generally upon such subject-matter, such legislation must be followed; and even R. S., sec. 914 is not applicable to matters which are regulated by Congress (as these territorial matters are), or when Congress is silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States.

McNutt vs. Bland, 2 How., 17.

Whitford vs. Clark, 119 U. S., 522.

Ex parte Iron Co., 128 Id., 544.

[handwritten:] ...e Trial: Errors occurring during the trial.

At the outset, it should be remembered that it is the doctrine of the Supreme Court that error is presumptively injurious; and, in a recent decision, the rule was formulated that errors in the reception of evidence will be held to be material where it does not appear beyond doubt that they could not prejudice the rights of the party against whom the evidence was received.

This ruling was made as recently as 1893.

Mexia vs. Oliver, 148 U. S., 664.

Assignments of Error: 1, 3, 4, 7, 8, 9, 10, 13, 22, 25, 33.

These are kindred errors, and the record shows the grounds of the objections:

1. Immaterial, irrelevant and incompetent.

2. Not proper cross-examination, because not responsive to, or confined within, the examination in chief. Special illustrations will be found in Assignments of Error 1, 3, 4, 7. For example, notwithstanding that no inquiry was presented to Captain White concerning outside lands in any way, or concerning improvements upon outside lands, yet on cross-examination the investigation was permitted to overleap the limits fixed by the direct examination, and the defendant was permitted to go into matters from which the direct examination was studiously kept clear. This method of proving facts upon a closely contested trial cannot be supported.

> Goddard vs. Crefield, Mills, 75 Fed. Rep., 818.
> Houghton vs. Jones, 1 Wall., 702.
> P. & T. R. R. vs. Stimpson, 14 Peters, 461.
> Wills vs. Russell, 100 U. S., 621.
> N. P. R. R. vs. Urlin, 158 U. S., 271.
> McCrea vs. Parsons, 112 Fed. Rep., 99.

The Stimpson case, supra, is the leading case on this subject; and there, Mr. Justice Story observed:

> "Now certainly these statements, if objected to by "the defendants, would have been inadmissible upon

"two distinct grounds: 1. First, as mere hearsay; "2. And second, upon the broader principle, now "well established, although sometimes lost sight of "in our loose practice at trials, that a party has no "right to cross-examine any witness except as to "facts and circumstances connected with the mat-"ter stated in his direct examination. If he wishes "to examine him in other matters, he must do so "by making the witness his own, and calling him, "as such, in the subsequent progress of the cause."

14 Peters, 461.

And so here. The attention of the witness, on direct examination having been limited to the land in controversy, if the defendant "wishes to examine him in "other matters (as to other lands, or as to improvements "upon other lands), he must do so by making the witness "his own, and calling him, as such, in the subsequent "progress of the cause."

3. These errors involved inquiry into lands not involved in this case—outside lands; and clearly, the market value of the particular leasehold involved here cannot be enhanced by some improvement or advantage located elsewhere. And this objection gives additional point and force to the one just presented. Special illustrations of this line of error will be found in Assignments of Error 1, 3, 4, 8, 9, 10, 22.

The principle that the market value of the particular

property presently in litigation cannot be enhanced by some improvement or advantage located elsewhere, or diminished by some absence of improvement or disadvantage located elsewhere, has been applied by the Courts to cases of this class; and the principle is so well grounded in plain, common sense that probably but one or two illustrations will serve to make it plain. Thus, in a New York case, it was said:

> "The plaintiff sought to prove the evil effects of "the road in diminishing values by the process of "calling the owners of property in the vicinity and "proving, in each case, what the particular prem-"ises owned by the witness rented for before the "road was built and what thereafter. There were " objections and exceptions. Such a process is not "permissible. Each piece of evidence raised a col-"lateral issue (Gough vs. Roberts, 53 N. Y., 619), and "left the Court to try a dozen issues over as many "separate parcels of property. We have held such "a mode of proof to be inadmissible. (Huntington "vs. Attrill, 118 N. Y., 365; in re Thompson, 127 N. "Y., 463). The elevated railroad cases in this Court, "to which the plaintiff refers us, give no warrant "for such a mode of proof, but indicate that the gen-"eral course and current of values must be shown "by persons competent to speak, leaving to a cross-"examination any inquiry into specific instances if

"such be deemed essential. Almost all the evidence "of depreciation was of the erroneous character, *and "we cannot say that it may not have worked harm "to the defendant."*

Jamieson vs. Elevated Railway, 147 N. Y., 325.

It is no more legitimate to seek to enhance the market value of the property in controversy by some improvement or advantage located elsewhere, than it is to diminish the market value of the property in controversy by some absence of improvement, disadvantage, or other "evil effect" located elsewhere; in either case a purely collateral issue is raised involving extrinsic questions and innumerable and interminable matters wholly foreign to the real issue in the case. But here, the defendant, against the objection and exception of the petitioner, was permitted to show that the Honolulu Plantation Company had a mill belonging to the plantation "in the vicinity" of the land in controversy (Assignment of Error 1); and to show what was the size of that mill (Assignment of Error 3); and after calling attention to the pumping plant of the company and its water supply in Halawa Valley, thoroughly effective for counsel's purposes, though ruled out—to show the distance of Halawa Valley from the land in question (Assignment of Error 4). Nor was this all. When Archer was on the stand the established rule of cross-examination was again violated, and again an attempt was made to ignore the actual condition of

the land in controversy on July 6th, 1901, and to swell its value by showing facilities, improvements, or advantages elsewhere, by showing that the Plantation Company had a water supply "immediately available" to the land in question, and that the pumps at Halawa Valley would pump, as to one of them, about 10,000,000 gallons, while the other would pump 7,000,000 gallons more or less (Assignment of Error, 7, 8, 9). This episode is remarkable for two things; first, because the Government persistently claimed that it was "dealing only "with the exact condition of the land on July 6th; if "they can show anything that was actually on the land "at that date, there would be no objection to it," and repeatedly objected that these excursions into outside lands were improper (Record p. 172, 587). And in the second place, because the same page of the Record (p. 172, 587) shows expressions by the Court directly in line with the objection now made against the sustaining of this verdict; thus, the Court remarked: "It is not proper "cross-examination; it is of a distant piece of land; "* * * If you get to wandering away from the value "of this land, you will be in a field of uncertainty." But notwithstanding this, notwithstanding that the attention of the witness had not been directed to this subject-matter on his direct examination, notwithstanding that the actual condition of the land in controversy on July 6th. 1901, did not include this water supply that was on a "distant piece of land," and notwithstanding

that it was sought to swell the value of this barren waste by proving an improvement situated on "a distant piece of land," yet, against the objection and exception of the Government, this injurious testimony was permitted to be spread before the Jury. The expression "immediately available" conveys no definite meaning; it does not state a fact; it is merely the conclusion, or individual judgment of the witness; and was reprehensible to the last degree. The rule that witnesses must state facts, and not conclusions, is an elementary one. If there be a rule well established in the law of evidence, it is that a witness should be confined to facts, leaving the conclusion to be drawn from those facts to the jury. The function of the witness was to state what he actually observed; but it is no part of that function for the witness to formulate for the jury a conclusion upon the facts which he observed or to which he testified. It is clearly not the province of a witness to act as judge or jury—to invade the province of the jury, or to substitute his conclusion for that of the jury; and it is against recognized principles to address questions to a witness which are so framed as to call upon him to determine controverted issues of fact, or to pass upon the effect of a series of facts. Thus, it would obviously be improper to ask a witness to state his conclusion upon the testimony in the case relating to any given question; because in such an instance, the witness is in effect asked to decide the merits of the case, which is a

duty wholly beyond his province; and no rule of law authorizes the usurpation by the witness of the province of the jury by drawing those conclusions of fact upon which the decision of the case depends. It is for the jury alone to draw conclusions and inferences from the facts proved; it is not for a witness to arrogate to himself the functions of witness, jury and judge, or to invade the legitimate province of the real triers of the facts.

In other words, there is no principle of the law of evidence, with which I am familiar, which justifies the admissibility of the impressions and conclusions of the witness. Thus, as observed in People vs. Sharp, infra, an exceedingly well considered case, "the opinion, the "thought, the understanding of the witness, is not evi- "dence." And this same idea has found expression in innumerable decisions of respectable courts. Thus, that a meeting was "disturbed" is incompetent (Morris vs. The State, 94 Ala. 457); that a contract has been "abandoned" is incompetent (R. R. vs. Woodworth, 8 So. (Fla.) 177); that goods were "accepted" is incompetent (Brewer vs. R. R., 107 Mass., 277); that possession was "adverse" is incompetent (Arents vs. R. R., 156 N. Y., 1); that an act was within an agent's "authority" is incompetent (Benninghoff vs. Ins. Co., 93 N. Y., 500; Green vs. R. R., 35 Am. Rep. 370); whether a party "assented" to a settlement, is likewise incompetent (Stanton vs. Crispell, 9 Hun, 502); that a house was in "good

repair" is incompetent (McMann vs. Dubuque, 107 Iowa, 62); whether one is a man of "financial ability," or "responsibility," or "solvency," or "insolvency," is incompetent (Thompson vs. Hall, 45 Barb., 216; Denman vs. Campbell, 7 Hun, 88; York vs. People, 31 Hun, 446: Hahn vs. Penney, 60 Minn., 487; Agnew vs. U. S., 165 U. S., 36); whether another had "knowledge" is incompetent (Bailey vs. State, 107 Ala., 151; McCouster vs. Banks, 84 Md., 292); that certain articles are "necessary" is incompetent (Poock vs. Miller, 1 Hilt., 108; Tolles vs. Wood, 99 N. Y., 616); whether one engine discharged more sparks than another is incompetent (Collins vs. R. R., 109 N. Y., 243); whether a person "has "done as agreed," is incompetent (Nichols vs. White, 41 Hun, 152; Clark vs. Ryan, 95 Ala., 406); and see further in support of this principle:

Watrous vs. Morrison, 33 Fla., 261.
State vs. Porter, 52 Pac. Rep., 175.
Linihan vs. State, 22 So. (Ala.), 662.
Raney vs. State, 45 S. W. (Tex.) 489.
Murray vs. R. R., 52 P. R. (Utah), 596.
People vs. Fogolson, 74 N. W., (Mich.), 730.
People vs. Sharp, 107 N. Y., 427.
Tillery vs. State, 24 Tex. App., 251.
Brinkley vs. State, 89 Ala., 34.
Largan vs. R. R., 40 Cal., 272.
Tait vs. Hall, 71 Id., 149.

People vs. Reed, 52 P. R. (Cal.), 835.

People vs. Elliott, 119 Cal., 593.

The double viciousness of this line of examination may be aptly illustrated by Assignment of Error 10; doubly vicious, first because seeking to fix the value of the land in controversy by some improvement or advantage located elsewhere; and secondly, because calling for the conclusion of the witness upon a litigated issue of fact. Not only was the question incompetent, but the witness was allowed to answer it, and to answer it affirmatively; and to answer it affirmatively without explaining what was meant by the phrase "within the lines of the Honolulu Plantation Company"; and for anything that appeared to the contrary, "the "lines of the Honolulu Plantation Company" might have extended for an indefinite distance. It appeared, later, in the testimony of Low, that this Plantation included about 8000 acres within "the lines of the Honolulu "Plantation Company" (Record, pp. 246, 253, 625-6); and it also appeared, later, from the testimony of this same witness, that "the lines of the Honolulu Plantation "Company" extended two and one-half miles on one side of the land in controversy, and five miles on the other side (Record, pp. 253, 626). For anything, then that appeared from the testimony in the case, we are confronted with the erroneous and injurious proposition that a flowing stream anywhere within 8000 acres,

or within two and one-half miles one way or five miles the other way, is "immediately available" to the land in controversy, no matter what may be the topography of the country, no matter what natural obstacles, impediments, or barriers may intervene.

And again, in Assignment of Error, 22, we have a repetition of all the vices of this ruling. Here the witness Low was asked to describe the nature and quality of the soil of the land sought to be condemned (Record, pp. 283-4, 633-4); in answering this question, he ceased to be responsive, and undertook to establish a comparison with certain outside and distant soil, by testifying, "we have similar soil in the Halawa Valley that we "have raised cane on"; but the protestation of the petitioner against this species of testimony was overruled, and the objectionable matter allowed to go to the jury, notwithstanding that "there is no general or well de- "fined principle of the law of evidence that enables a "party to establish the value of some particular or "specific thing by proof of the value of another thing "of the same class or general character," and notwithstanding the repeated and continuous objections of the petitioner to this class of testimony.

The most complete discussion of the point upon which I am insisting, will be found in a very recent and well considered case in the Court of Appeals of New York. There, the Court said:

"These views would be quite sufficient to dispose "of the appeal, and the discussion could properly "end here except for the fact that the learned coun-"sel for the plaintiffs has submitted quite an elabor-"ate argument with numerous citations of authori-"ties to show that the rule laid down in the Jamie-"son Case was a departure from correct principles "and from the doctrines sanctioned by previous de-"cisions of this court. In that case it was decided "that in cases of this character it is not permissi-"ble to call witnesses who owned property in the "vicinity of that involved in the suit, to show what "their premises rented for before and after the con-"struction of the railway, in order to affect the ques-"tion of damages to the property there in question. "The principle upon which the decision rests is that "such a rule, if sanctioned, would introduce into "the case collateral issues relating to each sepa-"rate parcel of property. *There is no general or "well-defined principle of the law of evidence that "enables a party to establish the value of some "particular or specific thing by proof of the value "of another thing of the same class or general "character.* It would scarcely be claimed that in "a controversy concerning the value of a horse "such value could be established by proof of the "value of another horse that bore more or less re-"semblance, or possessed some or all of the quali-

"ties of the one in question, according to the vary-
"ing notions of witnesses. A party upon whom the
"burden rests of proving the value of particular
"property, real or personal, must ordinarily con-
"fine the proof to the specific property in contro-
"versy. Cases may doubtless be found where, in
"other jurisdictions and in special statutory pro-
"ceedings for determining the value of real prop-
"erty, more or less support is given to the conten-
"tion of the plaintiff's counsel. But in most, if not
"all, of them it will be found that the inquiry was
"not governed by the rules of evidence that pre-
"vail at common law. There are many cases in
"which commissioners or other officers specially au-
"thorized to determine the value of real estate may
"act upon a personal view or examination of the
"property and generally upon other than the strict
"rules of evidence that have been established in
"courts of law and equity. Such cases have little,
"if any, bearing upon the question decided in the
"Jamieson case. Our attention has also been call-
"ed to cases in this court belonging to the same class
"of actions as this, where proof of the value of
"other and similar property, in the same locality,
"has been recognized as proper.

"It will be found, we think, upon careful exam-
"ination, that in most of these cases the court
"simply recognized a situation which the parties

"themselves had created by the general course of "the trial, or by consent or acquiescence and hence "they are in no way in conflict with the decision "in the case referred to. Evidence of this charac- "ter has, it is well known, been given by both par- "ties in this class of actions, and when we have found "it in the record, generally without objection, we "have treated it as the parties themselves treated it "at the trial, and have in that way recognized it, "when taken in connection with other proofs, as en- "titled to consideration in order to support a find- "ing or to answer some view of the case, taken for "the first time in this court, contrary to the gen- "eral course of the trial. This court does not re- "fuse to recognize facts determined at the trial, "though some part of the testimony tending to "prove them may have been, in its nature, incom- "petent for that purpose, and under a proper ob- "jection should have been excluded.

"The party complaining must raise the question "as to the quality or competency of the proof be- "fore the fact is found or the question decided and "not afterwards. In the other cases in this court "cited by the learned counsel for the plaintiffs, "proof of this character, found in the record, was "not regarded, under all the circumstances, as suffi- "ciently material to warrant a reversal. It was of "more importance as affecting the result than it

"appears to be in the case at bar. In the Jamieson "Case the question was sharply raised at the prop- "er time by a proper objection and exception and "the evidence thus received was substantially all "that could be found in the record to sustain the "finding. Our decision in that case did not, we "think, introduce any new rule of evidence or modi- "fy any principle that had been directly sanctioned "by prior decisions. It is not apparent how the "practice which was there condemned, if sanc- "tioned as a rule of evidence, can be of any great "value in this class of actions. *The extent of the "investigation would be subject to no limits ex- "cept such as might be prescribed by the discre- "tion of the trial court, and even when it could be "shown that the property was substantially similar "as to locality and physical surroundings, yet dif- "ferent parcels of property are affected in their "value by so many different causes, that in the end "there must be left a wide field for conjecture and "speculation.* The scope of the inquiry would be- "enlarged beyond all necessary or proper limits and "the mind of court and jury confused with a multi- "tude of conflicting and irrelevant facts. There is "no such inherent difficulty in proving the value "of real estate at a given time, as to require a re- "sort to such evidence. It may be proved by show- "ing the amount of its income to the owner, the

"general course of values, by the opinions of wit-
"nesses competent to judge, or by that of experts
"having special knowledge on the subject and fa-
"miliar with the causes which affect its rise or de-
"cline in the market. When the parties have given
"all proof on the subject which has long been rec-
"ognized as competent, for the purpose of ascer-
"taining the value of the property, it will generally
"be found that little, if anything, of any value, can
"be added by resorting to proof of the value of
"other property."

Witmark vs. R. R., 149 N. Y., 393, 398-401.
In re Thompson, 127 Id., 463.

But this vice of bringing in outside, collateral and irrelevant matters, together with the injury that it does, is aptly illustrated by a case in the same court. There, the court said:

"A witness on the part of the plaintiff, was asked
"this question: 'Do you know anything about a par-
"'ty recovering a judgment of $5,000, before Judge
"'Van Brunt?' This was objected to, the objec-
"tion was overruled, and an exception taken. The
"witness answered, 'I was not in that case, nor a
"'witness, and don't know anything about it; I
"'did hear from some parties outside that there
"'was such a thing.' It is evident from the pre-

"vious questions put to the witness, that this in-
"quiry was intended to refer to a judgment for an
"injury occurring at the same place. The question
"was clearly incompetent. It was not a relevant
"or pertinent fact upon any issues in this case, and
"was calculated to influence the jury injuriously to
"the defendant. What the facts of the other case
"were, could not be known, and if they were, could
"not legitimately affect the case on trial, while if
"the jury were informed that in another case a
"judgment of $5,000 had been rendered for the
"plaintiff, it might have affected their judgment,
"either upon the litigated questions of negligence
"or as to the amount of the verdict. * * *
"*Jury trials should be strictly confined to the is-*
"*sues made, and to the legitimate facts bearing*
"*upon them, and the practice of dragging in ex-*
"*traneous matters to influence the jury cannot be*
"*too strongly condemned. Upon a closely contest-*
"*ed question of fact, slight influences may turn the*
"*scale, and every rule of propriety and justice de-*
"*mand that nothing outside of the legitimate facts*
"*should be introduced to affect the minds of those*
"*who are to decide the question.* It is not in-
"tended to intimate an opinion that this case was
"not properly decided by the jury either upon the
"question of negligence, or as to the amount of the
"verdict, but the fact that some other person had

"recovered a verdict for a similar injury, was not "a proper subject of inquiry on this trial, *and we "cannot see that it had no influence upon the jury, "we think it was error."*

O'Hagen vs. Dillon, 76 N. Y., 171-3.

To the same effect: Jamieson vs. Elevated Railway, 147 Id., 325.

4. The errors enumerated above are also open to another objection, namely, that this excursion into outside lands was incompetent for the reason that the evidence should have been restricted to exhibiting the actual condition of the land involved on July 6th, 1901; and as illustrations of this point, I refer the Court more particularly to Assignments of Error, 7, 8.

That the evidence must be restricted to the issue, that it must be confined to the allegations (Gentry vs. U. S., 101 Fed. Rep., 51), that it must exhibit the actual condition of the precise property involved at the time of the taking, and that it must not stray off into a collateral examination of other properties, are propositions thoroughly supported by the authorities. Randolph tells us that the property to be condemned "is to be "valued as it stands" (Em. Dom., sec. 238); and Lewis says that the "proof must be limited to showing the "present condition of the property, and the uses to [illegible] it is naturally adapted, * * * and generally "remote and speculative inquiries should be excluded"

(2 Lewis, Em. Dom., sec. 480); and this proposition is so thoroughly settled in the law of Eminent Domain, that I shall take time to cite but one of the adjudicated cases bearing on the matter:

> "The damages must be measured by the market "value of the land at the time it was taken; not its "value to the petitioners, nor to the respondent; "not the value which it might have under different "circumstances from those then existing."

Moulton vs. N. Water Co., 137 Mass., 167.

5. The objectionable matter contained in the Errors above enumerated, was also erroneous, because the yields of these outside lands were immaterial, it not appearing that there was any identity of quality between them and the land in controversy, or that the land in controversy ever had any yield—thus rendering comparison impossible, because speculative. Special illustrations of this vice will be found in the Assignments of Error, 13, 22, 25. The testimony of Low, protested against in Assignment of Error 22, is objectionable upon other grounds hereinabove adverted to, but, like many more of these errors, it is objectionable on this ground also—though indeed the same may be said of Assignment of Error 25.

It should however, never be overlooked that the one fourteenth of this defendant's 8000 acres involved here

is raw, undeveloped, and untested land; it has never raised a crop of cane; it has never produced a dollar of income; its capacity was wholly an unknown quantity; and its capabilities are matters purely of guess and speculation. The speculative and uncertain nature of sugar lands is common knowledge; their dissimilarity, within restricted areas, was confessed in this case; and Low's own handwriting in Exhibit 14 (supra) fully illustrates this dissimilarity, and shows how, within the very contracted area involved here, nearly one-half is useless and unfit for cultivation. Hence, the folly of attempting to reason from one piece of land to another in the absence of clear and affirmative proof of identity of quality; and hence, too, in a jury trial, the grave injury resulting from permitting speculative dreams to be imported into the case to befog, mislead and prejudice the jurors,—for "even when it could be shown that the "property was substantially similar as to locality and "physical surroundings, yet different parcels of prop- "erty are affected in their value by so many different "causes, that in the end there must be left a wide field "for conjecture and speculation. The scope of the in- "quiry would be enlarged beyond all necessary or prop- "er limits and the mind of court and jury confused with "a multitude of conflicting and irrelevant facts."

Witmark vs. R. R., 149 N. Y., 400.

6. The last exception of those in this class above

enumerated, namely, Assignment of Error 33, was well taken. It is everywhere agreed that the redirect examination is limited by the cross-examination, just as the cross-examination is limited by the direct examination.

Dutton vs. Woodman, 57 Am. Dec., 46.
Blake vs. Stump, 20 Atl. (Md.), 788.
Backus vs. Barber, 77 N. W. (Minn.), 959.
State vs. Ussery, 118 N. Car., 1177.
Robinson vs. P. P. & W. Co., 31 P. R. (Okla.), 988.
Bank vs. Saling, 33 Oreg., 394.
Ranney vs. R. R., 67 Vt., 594.
Fry vs. Leslie, 12 S. E. (Va.), 671.
Schaser vs. State, 36 Wisc., 429.

7. Before leaving this class of errors, it is proper to point out that the error complained of in Assignment of Error 7, cannot be excused. A litigant must state the grounds of his objection, if his exception is to be of benefit; and a failure of the court to permit it deprives him of the essential right to have his cause heard upon legal evidence only.

Tabor vs. Bank, 62 Fed. Rep., 383.
Sigafus vs. Porter, 84 Fed. Rep., 435-6; grounds of objection.
Laber vs. Cooper, 7 Wall., 565; objection must be made at trial.

N. H. Co. vs. Pace, 158 U. S., 36; necessity of exception.

Assignment of Error 5.—This was a double question, which, of course, was not good practice. If either question had been asked, a specific objection could have been made; to the first that it had no foundation in that it did not appear that the witness knew how the return was made up; and to the second, that the return itself was the best evidence of what kind of return it was, thus eliminating the conclusion of the witness as to the law. This double question "called for the in-"formation which from any source might be in the pos-"session of the witness, and not for his knowledge. An "answer detailing the hearsay statements of others, "whether verbal or in writing, made at any time or "place would have been responsive."

Xenia Bank vs. Stewart, 114 U. S., 224, 232.

Other errors similar to Assignment of Error 5 are Assignments of Error 17, 18, 24; and a striking illustration may be found in Assignment of Error 18. The witness having testified that no sugar had been grown on the land in controversy by the Honolulu Plantation Company, counsel asks him "why not?" Such a question as this always elicits a mass of detrimental testimony by which the opposing party cannot be bound: What concern had the United States with the reasons

of the Honolulu Plantation Company for not planting sugar upon this land? The reasons and conclusions of the Honolulu Plantation Company upon that subject are not testimony by which the United States could be bound. The private reasons of the Company nourished *in petto* and uncommunicated to the Government were not testimony. The mental processes of this company, of its Directors or Manager, were not testimony. If the word "testimony" had any rational meaning, that meaning must involve acts and speech,—things done and things uttered; and if a narration of things which have been done, or of words which have been uttered, is asked for, the question will bear broadly upon its face its title or want of title to be regarded as permissible. But to ask a witness why he did a particular thing, or why he did not do a particular thing, is not to ask for testimony, and is calculated only to elicit the narrator's subterranean springs of action, with which his opponent is not concerned, and by which he cannot be bound. As the highest court in Pennsylvania has well remarked: "the thoughts of one party cannot be proved to bind "the other."

Thomas vs. Loose, 114 Pa. St., 35.

In other words, witnesses must state not merely facts, but those facts which are in themselves legal evidence,—not conclusions, not private reasons, not secret, uncommunicated motives of action or non-action. To adopt

the language of the Supreme Court heretofore quoted this objectionable question "called for the information "which from any source might be in the possession of "the witness, and not for his knowledge. An answer "detailing the hearsay statements of others, whether "verbal or in writing, made at any time or place, would "have been responsive."

Xenia Bank vs. Stewart, 114 U. S., 224, 232.

This is precisely what was done here,—a proceeding which, I submit, was manifestly erroneous, and a violation of a rule repeatedly announced.

People vs. Simonds, 19 Cal., 275.
People vs. Griffin, 52 Id., 616.
Wheless vs. Rhodes, 70 Ala., 419.
People vs. Gonsales, 71 Cal., 569.
Woods vs. Whitney, 42 Id., 358.
Burns vs. Campbell, 71 Ala., 271.
People vs. Powell, 87 Cal., 349.
People vs. Wallace, 89 Id., 158.
McCormack vs. Joseph, 77 Ala., 236.
Brown vs. Hickey, 68 Iowa, 330.
Stuart vs. Whitlock, 58 Cal., 2.
McDonald vs. Jacobs, 77 Ala., 524.
Herring vs. Skaggs, 34 Am. Rep., 4.
Williams vs. State, 26 So. Rep., 521.
People vs. Sharp, 107 N. Y., 427.

Assignments of Error 6, 12, 31, 35.—These errors involve mere speculation and possibility as to the productive capacity of a tract of land which never had been sowed or cropped,—which never had produced anything whatever; and the view taken by Mr. Lewis negatives the propriety of this testimony:

2 Lewis, sec. 480.

At best, this land, as to the leasehold interest therein, should only be valued in a general way as possible sugar land; but its estimated productive capacity is incompetent, because involving such uncertain and speculative elements as the number of tons, the cost of production, fluctuating atmospheric conditions, uncertain rain-fall, the uncertainties of the labor market, the well-known fluctuations of the sugar market, and the industry, skill, etc., of the operator of the plantation. These elements are entirely too dependent upon personal and accidental considerations to be taken into account; and it is submitted that no evidence should have been received as competent which was a mere speculation upon the probable or imaginary productiveness of property which confessedly had never raised a crop.

Searle vs. R. R., 33 Pa. St., 63-4.

R. R. vs. Balthaser, 119 Id., 482-3; approved in S. D. L. Co. vs. Neale, 78 Cal., 63.

Doud vs. R. R., 76 Iowa, 438.

R. R. vs. Worcester, 155 Mass. 35.
R. R. vs. Galgiani, 49 Cal., 139.
De Boul vs. R. R., 111 Ill., 499.
In re R. R., 35 Hun., 633.
Cobb vs. Boston, 109 Mass., 438.
Maynard vs. N. Ham., 157 Id., 218.
Ranlet vs. R. R., 62 N. Ham., 561.
R. R. vs. Patterson, 107 Pa. St., 461.
Miller vs. Water Co., 148 Id., 439.
R. R. vs. R. R., 12 Cush., 605.
Whitman vs. R. R., 3 Allen, 133.
Minister of Finance vs. Castle, 8 Haw., 106.
Lihue Plant. Co. vs. Farley, 13 Id., 284.

The Hawaiian cases above cited fully illustrate the uncertain and problematic character of these plantation enterprises. Thus, in Minister of Finance vs. Castle, supra, the Court, speaking of "an agreement that in "lieu of rent for the demised premises the lessor shall "be paid one-twenty-fifth of all proceeds of all sugars or "other produce raised on said lands after deducting cer-"tain specified expenses and charges", said:

> "As to the second matter, to try and fix the "stamp duty on such an agreement for rent would "only be working in the dark and guess work— "there is nothing certain; all would have to de-"pend on the state of the market, state of the "crops, state of the weather and many other con-

"tingencies, which it is impossible for human abil-
"ity to ascertain with any certainty."

The impossibility of procuring any but the most speculative and uncertain estimates in cases of this class, is further indicated by the following remark of the Chief Justice in Lihue Plantation Co., vs. Farley, supra:

> "It is exceedingly difficult to value property of
> "this kind—especially when, as in this instance,
> "no sales of stock in the company have taken place
> "for some years. Many things besides such facts
> "as are set forth above are to be considered. Some
> "of these bear on general conditions such as the
> "political status of the Islands, which have since
> "the last decision been annexed to the United
> "States, the assurance that our sugars will not be
> "liable to customs duties, the prospects in regard
> "to the supply of labor, the money market, and
> "other things which affect values generally. But,
> "after all, it is impossible to accurately estimate
> "the value, or to reason it out with a fair degree
> "of certainty. In a case of this kind different per-
> "sons, though the most expert in such matters,
> "would vary greatly in their opinions—even to the
> "extent of hundreds of thousands of dollars."

And the same idea recurs in a typical case,—typical,

that is to say, of the general doctrine upon this subject:

> "The fact to be ascertained was the value of the "land at the time of the taking. It is not allowed "to arrive at this fact by the proof of the annual "net profits derived from a particular use. The "profit for any year would depend upon many and "varying circumstances, such as the nature of the "season, the price of labor, the condition of the mar-"ket as to supply and demand in respect to the "particular product, etc. The valuation derived "from such evidence would be conjectural and specu-"lative, and would not form a proper basis for an "estimate of damages."

S. & C. R. R. Co. vs. Galgiani, 49 Cal., 140.

Assignments of Error 11, 19, 20, 21, 23, 36.—These errors result from the admission of evidence which did not call for the market value but merely for the special, peculiar and limited value of the property to a particular individual, namely, the Company defendant; in other words, this illegitimate evidence elicited individual or personal ideas or conceptions of value, as distinguished from market value. The impersonal character of market value was entirely overlooked, and market value was confused with the personality or needs of the Plantation defendant. This type of evidence is

everywhere reprobated; and all the authorities agree that the compensation is to be measured by the impersonal rule of market value, and not by the personal needs or private valuations of the owner.

This theory of the law, that market value is a purely impersonal element quite distinguishable from the personality or personal views of the owner of the property, is approved by the Supreme Court in the following language:

> "In determining the value of land appropriated
> "for public purposes, the same considerations are
> "to be regarded as in a sale of property between
> "private parties. *The inquiry in such cases must*
> "*be what is the property worth in the market,*
> "viewed not merely with reference to the uses to
> "which it is at the time applied, but with reference
> "to the uses to which it is plainly adapted; that is
> "to say what it is worth from its availability for
> "valuable uses. Property is not to be deemed
> "worthless because the owner allows it to go to
> "waste, or to be regarded as valueless because he
> "is unable to put it to any use. Others may be
> "able to use it, and make it subserve the necessities
> "or conveniences of life. Its capability of being
> "made thus available gives it a market value which
> "can be readily estimated."

Boom Co. vs. Patterson, 98 U. S., 403.

The phrase "market value" is defined in the Am. & Eng. Encyclopaedia of Law, to be a "price established "by *public sales in the way of ordinary business"*; and the authorities collected in the accompanying note are themselves, as well as the definition itself, entirely inconsistent with the theory upon which the objectionable evidence was admitted;—entirely inconsistent, that is to say, with the idea that market value is to measured by the peculiar personality or private needs of the owner of the property taken.

19 Ency. Law, 2nd Ed., 1153.

Mr. Randolph, with his customary clarity of vision, puts the matter thus:

> "The most important and often the only step in "the assessment of compensation, is the determ-"ination of the market value of the property af-"fected. This value is presumably its present "worth in cash. The market value of property is "not affected by the personality or needs of its "owner. The property is not to be valued in the "light of any convenience or association which may "make it peculiarly desirable to the possessor, but "solely with regard to the elements which would "make up its worth to any person happening to own "it.
>
> "The impersonal quality of market value is fur-

"ther illustrated by the rule which forbids con-
"sideration of the necessities of the expropriators,
"or the probable value of the property under their
"management."

Randolph Em. Dom., sec. 234.

And Mr. Lewis, in formulating the general principles to be applied in estimating value, disposes of the matter as follows:

"In estimating the value of property taken for
"public use it is the market value of the property
"which is to be considered. * * * It is not a
"question of the value of the property to the owner.
"Nor can the damage be enhanced by his unwilling-
"ness to sell."

2 Lewis, Em. Dom., sec. 478.

And the rule of market value is fully recognized in this Circuit:

"You will understand, gentleman, that it is your
"duty to assess the damages in this case at the
"market value of the land. The testimony is di-
"rected to that question."

Per Morrow, Circuit Judge; Charge to Jury in U. S. vs. Spring W. W., No. 12908. Charge filed Jan. 14, 1901.

But here, Archer, against the objection and exception of the Government, was permitted to take into consideration "the whole property of the Honolulu Plantation Company that is available for use in connection with that land" (Assignment of Error 11); and although the question was incompetent as traveling beyond the issue yet it was also an incompetent hypothetical question in that, ignoring the market value, it dragged in the personal equation of the defendant. The testimony of Bolte, admitted against the objection and exception of the Government, was directly in the teeth of all the authorities (Assignments of Error 19, 20). He was permitted to testify immediately and directly, not to the market value of the leasehold interest involved, but to "the value of the leasehold interest of that land "on the 6th day of July, 1901, to the Honolulu Plantation Company"; and his unusual estimate of "$450,000" is reflected in the absurd verdict of this jury. And this was done in the face of the objection that "it is settled "law that what this may be worth to the Honolulu Plantation Company is not a fair test of the market value" (Record, p. 628-9).

When Low was on the stand, and inquiry was made of him concerning the buildings upon the property, he gave the value of those buildings "to this Company"; the Government, in moving to strike out this illegal matter again directed the attention of the court to the

point involved by remarking: "It is perfectly apparent "from the testimony that it makes no attempt to reach "the market value. * * * It is illegitimate, the "value it may be to any particular individual as dis-"tinguished from the market value." (Record, p. 633.)

This same injurious error again appeared during the testimony of Low upon the only vital issue in the case, namely, that of the value of the property involved. The occurrences are thus detailed in the Record:

> "Mr. SILLIMAN. Q. Mr. Low, what is the val-"ue of the property sought to be condemned to the "Honolulu Plantation Company?
>
> "Mr. DUNNE. I object to the question upon two "grounds; first, on the ground that it does not seek "to bring forth market value and upon the ground "second that it seeks to limit the value therein "spoken of to the individuals, to wit: the Honolulu "Plantation Company as distinguished from market "value.
>
> "The COURT. Let him answer the question.
>
> "A. Four hundred thousand dollars.
>
> "Mr. SILLIMAN. What was its value on the "6th of July, 1901?
>
> "A. To the Honolulu Plantation Company?
>
> "Q. Yes, sir.
>
> "Mr. DUNNE. The same objection.

"The COURT. The same ruling.

"Mr. DUNNE. We except.

"A. Four hundred thousand dollars."

(Record, pp. 635-6.)

And even when Higby was testifying concerning buildings, the same error recurred,—the same failure to discriminate between market value upon the one hand, and individual or personal value upon the other (Assignment of Error 36).

It is confidently submitted that these rulings cannot be sustained upon any theory known to the law of Eminent Domain. The principles deducible from the authorities hereinabove cited under this head, stamp these rulings as fatal and reversible error; for there can be no middle ground between the universally accepted criterion of market value, upon the one hand, and the personal needs of an individual, upon the other. Market value is impersonal; it is independent of individuals; it is a growth or product from the usual operations of business; and it takes no account of the private needs, capricious judgments, or fanciful valuations of individuals. Market value has some stability, but the fancy estimates of value of property to the owner are as fickle and fluctuating as the private views, whims or personal greed of individuals; and it is submitted that the obligation of the government to make compensation, should not be measured by any such whimsical

standard as that involved in the Errors complained of above.

In a very well considered case in Missouri, the distinction for which I am contending, is indicated in these words:

> "If the criterion of the value given by the court "in the second of the above instructions be correct, "one might be convicted of grand larceny for steal- "ing a finger ring of the intrinsic or market value "of $5, only because, forsooth, being a gift to the "owner by a departed friend, or wife or other loved "one, he placed an estimate upon it far beyond its "value, although of no greater value to third per- "sons than another ring of the same kind, which "could be purchased wherever kept for sale for $5. "The criterion of value by which the jury were told "in that instruction they might be governed does "not apply as a general rule in civil proceedings, "and when the statute requires that property "stolen shall be of the value of $10 in order to con- "stitute the theft there of grand larceny, the term "value" is to be taken in its legal sense, which does "not differ from its common acceptation, and there "is no warrant for allowing any other mode of as- "certaining the value of stolen property in a crim- "inal prosecution than that which prevails gener- "ally in criminal proceedings. It is not the fancy "estimate of value placed upon the property by the

"owner which is to determine whether the theft is "grand or petit larceny, but its actual value as that "value is usually ascertained in other proceedings.

"If one sue another for conversion of personal "property, he recovers not what the property was "worth to him, but its value in the market; and it "would be strange enough if, when the statute de- "clares that no one shall be adjudged guilty of "grand larceny unless the goods stolen were of the "value of $10, a criterion of value should be adopt- "ed which would authorize a conviction for that "offense, when the goods stolen were worthless to "third persons and of no market value, but possess "a value which can only be measured by fancy or "sentiment, a measure of value as uncertain and "variable as the whims and caprices of the owner of "the goods, or the witnesses he may introduce to "prove their value. We cannot substitute this for "the stable and certain measure furnished by the "price which such goods command in the market."

State vs. Doepke, 30 Am. Rep., 787-8.

That this same distinction runs through all the law, may be illustrated by a New Hampshire criminal case. In that case it was observed by Bingham, J.:

"It was a chattel. * * * Its value as a stat- "utory subject of larceny is the market value; and "evidence that it is worth $20 to its owner, and

"worth nothing to anybody else, does not show its "market value to be $20. To be of the market "value of $20 it must be capable of being sold for "that sum at a fairly conducted sale,—at a sale "conducted with reasonable care and diligence in "respect to time, place, and circumstances, for the "purpose of obtaining the highest price."

State vs. James, 58 N. H., 67.

And this distinction is observed in other branches of the law also. Thus, in an English case, it appeared that the plaintiff was a clothier at Manchester, and sent a parcel of goods by the defendant's railway to his traveler at Cardiff. The parcel was delayed through the negligence of the defendants, and the traveler after waiting two days beyond his usual time, left before it was delivered, and the goods were consequently not sold but forwarded, instead of a fresh parcel, to the traveler at the next town he visited. No notice had been given to the defendants of the object for which the goods were sent. The County Court Judge having decided in favor of the plaintiff, and included in the damages the profits which the plaintiff would have probably made by the sale of the goods at Cardiff, the defendants appealed against this decision. On appeal, it was argued that the market value is the value of the goods *to the plaintiff* for purposes of sale; but the court held that "the market value of the goods was their "value in the market *independently of any circumstan-*

"*ces peculiar to the plaintiff,* and that the profits that "would have been made by the sale of the goods at "Cardiff through the plaintiff's traveler being present, "could not be recovered."

G. W. R. R. vs. Redmayne, L. R., 1 C. P., 329.

When we turn to the special subject of market value in eminent domain proceedings, we find the same distinction recognized, and the same rule universally applied. Thus, in a well considered and frequently cited California case, the following language was used:

> "The word 'value' is used in different senses. "Bouvier, in his definition, says: 'This term has two " 'different meanings. It sometimes expresses " 'the utility of an object, and sometimes the power " 'of purchasing goods with it. The first may be " 'called the value in use, the latter the value in " 'exchange.' For the purposes of the law of em- "inent domain, however, the term has reference to "the value in exchange, or market value. There "are some cases which seem to hold that the value "in use to the owner is to be taken if it exceeds "the market value. But it will generally be found, "on a careful examination, that such cases either "relate to the damages accruing to the owner from "the taking, and not to the value of the property "itself, or overlook the distinction between the two

"things. The consensus of the best-considered
"cases is, that for the purposes in hand the value
"to be taken is the market value, by which is un-
"doubtedly meant, not what the owner could real-
"ize at a forced sale, but 'the price that he could
"'obtain after a reasonable and ample time, such
"'as would originally be taken by an owner to
"'make sale of like property.'"

S. D. L. Co. vs. Neale, 78 Cal., 67-8.

In a well considered Massachusetts case, the nisi prius Court charged the jury, in an eminent domain case involving a leasehold interest, as follows:

"The value of the leases is their market value;
"'market value' means the fair value of the prop-
"erty, as between one who wants to purchase and
"one who wants to sell any article, not what
"could be obtained for it under peculiar circum-
"stances, when a greater than its fair price could
"be obtained; not its speculative value; not a value
"obtained from the necessities of another. Nor
"on the other hand, is it to be limited to that price
"which the property would bring when forced off
"at auction, under the hammer. It is what it
"would bring at a fair public sale, when one party
"wants to sell and the other to buy. The fact,
"therefore, that one of these lessees, Lawrence, as
"had been argued by his counsel, did not want to

"move, wanted to stay there, would have paid a "very large sum to stay there, is not a test of market "value, because it is not a case of one who wants to "sell and one who wants to buy. If Lawrence had "wanted to go out, the question is, what would his "lease have brought? *Not what it would have been "worth to him if he had wanted to stay there, be-"cause it may have been of greater value or of less "value to him than its value upon the market. "That simply determines its value to him, not its "market value.* The question for you to consider is, "if Lawrence wanted to sell this lease, what could "he have obtained for it upon the market, from par-"ties who wanted to buy and would give its fair "value?"

These instructions were attacked on appeal at considerable length, but, notwithstanding, the respondent was not called upon to reply; and the court, through Gray, C. J., subsequently a member of the Supreme Court of the United States, held these instructions to be "correct and sufficient," and overruled the exceptions.

Lawrence vs. Boston, 119 Mass., 126, 128-9, 132.

The same idea recurs in a Minnesota case. There, an attempt was made to fix value by proof of the utility of the property to a particular corporation for a particular purpose, namely, railroad purposes; but the lower Court excluded the questions asked, and on appeal, the Supreme Court said:

"Whether the two excluded questions were ad-
"missible or not, it is quite apparent that the wit-
"ness, according to his own testimony, was unable
"to answer them, and that the exclusion, therefore,
"worked no prejudice to the appellant. But, aside
"from this consideration, we are of opinion that the
"view taken by the court below was the correct one,
"viz., that the proper question was, what is the
"value of the property sought to be condemned for
"any purpose? that is to say, for any purpose for
"which it is adapted and is available. No reason
"can be given why property taken under the em-
"inent domain law by a railroad company, or for
"any public purpose, should be paid for at a rate
"exceeding its general value—that is to say, its
"value for any purpose. Any use for which it is
"available, or to which it is adapted, is an element
"to be taken into account in estimating its general
"value. But where a condemnation is sought for
"the purposes of a railroad, to single out from the
"elements of general value the value for the spe-
"cial purposes of such railroad, is in effect to put
"to a jury the question, *what is the land worth to*
"*the particular railroad company, rather than what*
"*is it worth in general? The practical result would*
"*be to make the Company's necessity the land-own-*

"er's opportunity to get more than the real value "of his land."

Stimpson vs. R. R., 27 Minn., 284.

In Moulton vs. Newburyport Water Co., above cited, the rule was briefly, but clearly formulated thus:

"The damages must be measured by the market "value of the land at the time it was taken; not "its value to the petitioners, nor to the respondent; "not the value which it might have under different "circumstances from those then existing."

Moulton vs. N. Water Co., 137 Mass., 167.

In a later case, the lower court charged the jury thus:

"The petitioners were not entitled to swell the "damages beyond the actual market value by any "consideration of its special use. Now, upon the "general subject, how are you to compute the dam-"ages? You are to determine what was the fair "market value of the land taken by the city. In "determining this, the jury ought to determine its "capabilities, and the purposes for which it may be "used, and also that, under the statute, the title "to the land was vested in the respondent. The "value is to be assessed according to its value when "taken, having regard to the uses to which it may "probably be applied. The point to which I want

"to call your attention is the following extract from "the opinion in that case, (Moulton vs. Newbury-"port Water Co., 137 Mass., 163, 167), which I adopt "as the law in this case: 'The damages must be "'measured by the market value of the land at the "'time it was taken; not its value to the "'petitioners, nor to the respondent; not the value "'which it might have under different circumstan-"'ces from those then existing.' The value for a "special purpose is not the test, but the fair mar-"ket value of the land in view of all the purposes "to which it was naturally adapted. That must be "the rule here. I do not suppose it is competent "for you to take into consideration, in computing "these damages, the value of this land to the city "for sewerage disposal and improvement. There "has been evidence how the city was using it, how "advantageous the city has found it to be for cer-"tain purposes; but the laws says, it is not the "value to the city, and neither is it the value to "the petitioners, that is to govern, but the fair "market value of the land in view of all the pur-"poses for which it was naturally adapted."

On appeal, these instructions were fully approved in the following language:

"The instructions so far as shown by the report "are recited above. In giving them, the Court read

"from the opinion in Moulton vs. Newburyport
"Water Co., 137 Mass., 163. Taken as a whole. the
"instructions state correctly and with sufficient
"clearness and fullness the elements of damages
"and the manner in which they should be consid-
"ered by the jury. The jury were told, in sub-
"stance, that in computing them, they were to de-
"termine the fair market value of the land at the
"time of taking; that they were to take into ac-
"count its capabilities, and the purposes for which
"it might be used, and to proceed in view of all the
"uses and purposes to which it was naturally
"adapted, or to which it might probably be applied,
"and that they were to form their estimate of its
"value under all those circumstances; that the
"damages were not to be measured by its value to
"the petitioner nor to the city, nor by the value
"which it might have under different circumstances
"from those then existing, and that the value for a
"special purpose was not the test, but its fair mar-
"ket value in view of all the purposes to which it
"was naturally adapted."

R. R. vs. Worcester, 155 Mass., 35.

And so in New York. The distinction contended for here was fully recognized by so eminent a Judge as Bronson, and in a very well considered case, he remarks:

"But however much the necessity for disarrang-
"ing the plans of any individual may be regretted,
"the greater principle upon which public improve-
"ments are to be affected must be substantially the
"same in all cases. All classes and conditions of
"men hold their property subject to the paramount
"claims of the state; and when it is taken for pub-
"lic purposes, and the question of compensation is
"presented, the only proper inquiry is, what is its
"value? *The question is not, what estimate does*
"*the owner place upon it, but what is its real*
"*worth, in the judgment of honest, competent and*
"*disinterested men?* The use to which the owner
"has applied his property is of no importance be-
"yond its influence upon the present value. If
"highly cultivated, it will be worth more than
"though it had been suffered to run to waste.
"* * * What price will it bring in the market?
"That is the proper inquiry in a proceeding of this
"kind. As between individuals, the owner may de-
"mand any price however exorbitant, for his prop-
"erty; but when it is taken for public purposes,
"he can only demand its real value. That value
"cannot depend in any degree on his own will.
"To allow either his judgment or his fancy in re-
"lation to the proper use of the property to in-
"fluence the question, would be to make the es-

"tate either more or less valuable, as it might hap-
"pen to be possessed by one individual or another."
In re Furman St., 17 Wend., 649, 669, 670.

The same doctrine is recognized in Pennsylvania, in a very recent case, where the Supreme Court of that Commonwealth expressed itself thus:

"Where property is injured by the construction "of public works the measure of damages is the "difference in the market value of the property be- "fore and after the construction. The creation of "noise and dust, the invasion of privacy, the de- "privation of light and means of access, the burden "of additional fencing and like matters are to be "taken into consideration as affecting the market "value. They are not separately to be estimated, "item by item and a result to be reached by adding "together the different estimates, *nor is the effect "upon the particular owner because of anything "peculiar to himself, or his business to be taken in- "to consideration.* The owner's loss is measured "by the difference in the market value of his prop- "erty; this includes all the elements of depreciation "and represents the whole loss. But the separate "items are to be considered, not as distinct items "of loss, but as they affect the market value. This "is the rule established by a long line of cases, "among the more recent of which are Dawson vs.

"Pittsburg, 159 Pa. St., 317; Reyenthaler vs. Phil-
"adelphia, 160 Pa. St., 195; Comstock vs. Clearfield,
"etc. Ry. Co., 169 Pa. St., 582; Struthers vs. Phil-
"adelphia etc. R. R. Co., 174 Pa. St., 291."

Shano vs. Bridge Co., 189 Pa. St., 245.

Other cases to the same effect might be cited; but I believe that a sufficient showing has been made to point out the confusion between market value proper and that personal value which is peculiar to the owner of the property, and which is limited merely by his needs, fancies or whims. The obscurity upon this point resulted in the admission of evidence which was most damaging to the Government, and permitted the defendant to lay before the jury, not evidence of market value at all, but merely of the private and personal estimate of the Plantation Company,—a course which could have had no other tendency except to mislead the jury and to operate to the detriment of the Government, particularly since the burden of proof was erroneously put upon the Government ("The burden of proving the "value of the land rests upon the defendant, and it is "the duty of the defendant to establish the market "value of the land by a preponderance of evidence"; per Morrow, Circuit Judge; Charge to the Jury in U. S. vs. S. V. W. W., No. 12908, Charge filed Jan. 14, 1901). It cannot be said "that these errors were immaterial, as

"it does not appear that they were errors which could "not prejudice the rights of the plaintiff."

Mexia vs. Oliver, 148 U. S., 664, 673.
Gilmer vs. Higley, 110 U. S., 47.
V. & M. R. R. vs. O'Brien, 119 Id., 99.
St. Louis etc. Ry. vs. Needham, 63 Fed. Rep., 107.
Nat. Mas. Assn. vs. Shryock, 73 Id., 774, 781.
Boston etc. R. R. vs. O'Rielly, 158 U. S., 334, 337.

Assignments of Error 14, 15.—In Assignment of Error 14, Mr. Thrum's opinions were excluded, because he was not an "expert." It was purely upon this ground that the Court sustained the objection. But when we turn to Assignment of Error 15, where the Government sought to explain further the standing of Mr. Thrum, by showing his experience on the Ewa Plantation, the defendant's motion to strike out was granted, not upon the ground that this testimony was not proper re-direct examination, but upon the ground that this testimony was not material. I submit, however. that the testimony was material to illustrate Mr. Thrum's qualifications to speak concerning the value of the leasehold; and that in this respect the granting of the motion to strike out, as well as the sustaining of the objection forming Assignment of Error 14 were erroneous. The rule seems to be that the average intelligent man, *if shown to be qualified by a knowledge of the value in*

controversy, may give his opinion thereon, though not a technical "expert."

2 Lewis, sec. 437.
Swan Co. vs. Middlesex, 161 Mass., 173.
Huff vs. Hall, 56 Mich., 456.
P. R. R. vs. Bunnell, 81 Pa. St., 426.
C. R. R. vs. Wolf, 74 Geo., 664.
S. D. L. Co. vs. Neal, 78 Cal., 63.
T. H. R. R. vs. Crawford, 100 Ind., 550.
Alt. vs. Cal. Fig. Co., 19 Nev., 118.
Dalzell vs. Davenport, 12 Iowa, 437.
Whitfield vs. Whitfield, 40 Miss., 352.
Cantling vs. R. R., 54 Mo., 385; 14 Am. Rep., 476.
Mish vs. Wood, 34 Pa. St., 451.
Thatcher vs. Kaucher, 2 Colo., 698.
Cooper vs. State, 53 Miss. 393.
Cooper vs. Randall, 59 Ill., 317.
Wash. Co., vs. Webster, 68 Me., 449.
Foster vs. Ward, 75 Id., 594.
Sullivan vs. Lear, 23 Fla., 463; 11 A. S. R., 388.
Whiting vs. Ins. Co., 76 Wisc., 592.
Reggan vs. R. R., 111 Mo., 456.
Latham vs. Brown, 48 Kans., 190.
Finch vs. R. R., 46 Minn., 250.
Roberts vs. Boston, 149 Mass., 346.
Laing vs. R. R., 54 N. J. L., 576.

Assignment of Error 16.—This was an attempt, in

the language of counsel, (Record, p. 236), to impeach the character of Mr. McCandless' testimony, because some person other than Mr. McCandless had placed upon the Oahu Sugar Plantation a valuation which counsel deemed to be inconsistent with the valuation placed by the witness upon the property, that is to say, the real estate, of the Oahu Sugar Plantation. The witness had testified, pages 232. 621, that "the Oahu Sugar Company "leased Ford Island and peninsula from the II Estate "for \$12½ per acre per annum"; and on cross-examination, counsel undertook to show, for the avowed purpose of discrediting the witness, that a certain large valuation was placed by the Company upon its plant at Ford Island,—so large, counsel thought, as to be inconsistent with the witness' statement that the original lease was for \$12½ per acre per annum. No attempt was made to show that the original lease was not for \$12½ per acre per annum; no attempt was made to show that the large and inconsistent valuation, so claimed, reflected the views of the witness; and no attempt was made to show that the witness in any way participated in the making of this alleged inconsistent valuation. It did appear from the testimony of the witness that he was a director in the Oahu Sugar Company; it did appear that all of Ford Island which was in fact condemned was 23 acres as against 142 acres originally intended for condemnation, and on which the alleged inconsistent valuation was based; and it did

appear, affirmatively, not only that the witness neither signed nor swore to the alleged inconsistent valuation, but also that, although a director, yet he was not present at the meeting of the Board of Directors at which the alleged inconsistent valuation was settled upon, and in no way participated in the making or filing of that valuation. In other words, the only imaginable thread of connection between the witness and this pretended inconsistent valuation, consisted in the naked and totally undraped fact that the witness happened to be at the time a director in the corporation. Absolutely no personal connection was established between him and the alleged inconsistent valuation, and no foundation whatever existed to charge him with any responsibility for this act of the other directors of the corporation.

But, again. There was no showing that the United States participated, directly or indirectly, in the framing of this alleged inconsistent valuation. No relation whatever was established between that valuation and the petitioner herein against whom the valuation was offered; and thus, as against the Government, this alleged inconsistent valuation amounted to nothing. It appeared, however, that all contentions between the Oahu Sugar Company and the Government had ceased and had been determined by an amicable settlement. And it is submitted, therefore, that this illegitimate attempt to

"impeach" the fairness of Mr. McCandless was erroneous and prejudicial to the rights of the Government.

So far as the amicable settlement between the Government and the Sugar Company was concerned, that was a proceeding in which the defendant here had neither part nor lot; and it was a proceeding which the Government had an undoubted right to close and forever seal up by "buying its peace."

> Daly vs. Coons, 64 Ind., 548.
> Kinney vs. C. V. Mining Co., 4 Saw., 441.

In the next place, how can the United States, in this present cause, be bound by the views of certain officers of the Oahu Sugar Company, or by the views of the Sugar Company, as to the value of a piece of land not involved in this case? Such views would not conclude the United States, even if they related to the land in controversy in this case; how much less, then, when relating to other and foreign lands? All the objections, indeed, which have heretofore been urged against excursions into outside lands, and against the attempt to swell the value of the land involved here by a consideration of some improvement, advantage or higher valuation upon lands located elsewhere, make with equal force against the position taken in this behalf. This attempt was sheer res inter alios acta; it obliterated the legal identities of transactions; and it seemed to be the opinion of counsel that any transaction which might possibly help his case

should be admitted in evidence, no matter how foreign, and no matter how barren of privity. It seemed, indeed, to be his idea that any transaction could be proved to bind the Government, whether any connection between the Government and the transaction was established or not.

But before this alleged inconsistent valuation could have been admitted to "impeach" McCandless, some sort of privity should have been established between him and the alleged inconsistent valuation, some sort of participation by him in that valuation, so that the valuation could fairly and reasonably be said to be his act, and chargeable against him. But McCandless, as the testimony shows, although a director in the Company, yet was not present at the meeting of the Board of Directors at which the alleged inconsistent valuation was framed, neither signed nor swore to the instrument setting forth that valuation, and in no manner participated in the making thereof. As already observed, that valuation was the act of the corporation, and the only thread of connection between the witness and it lay in the naked circumstance that he happened to be a director. But

> "The general doctrine is well established, and ob-
> "tains both at law and in equity that a corporation
> "is a distinct entity, to be considered separate and
> "apart from the individuals who compose it, and is
> "not to be affected by the personal rights, obliga-

"tions and transactions of its stockholders; and this, "whether such rights accrue or obligations were in- "curred before or subsequent to incorporation."

Moore Co. vs. Towers Co., 87 Ala., 206.

Boone, Corporation, sec. 3.

There seems to be no such identification of the Director with the corporation, or of the corporation with the director, as to charge either with responsibility for the act of the other; nor is there any rule of law which charges either a stockholder or a director with actual knowledge of the business transactions of the corporations, merely because he is such stockholder or director; and it is even a matter of grave concern whether the books of a private corporation are competent evidence against a member or director of his contract or private dealings with the company, for in that respect he is deemed a stranger.

Rud vs. Robertson, 126 N. Y., 113.

Stephens, Evidence, Chase Ed., 114.

Smith vs. Dorn, 96 Cal., 76.

Piersall vs. Tel. Co., 124 N. Y., 256.

S. & L. Soc. vs. Gerichten, 64 Cal., 520.

Aldridge vs. The State, 88 Ala., 113.

Wheeler vs. Walker, 45 N. H., 355.

Phillips vs. The State, 96 Geo., 293.

Wickersham vs. Crittendon, 93 Cal., 17.

Blum vs. Robertson, 24 Id., 128.

Hagar vs. Cleveland, 36 Md. 477.

Lothiam vs. Wood, 55 Cal., 159.

2 Thompson, Corp., sec. 1932.

People vs. Dye, 75 Cal., 113.

Assignments of Error, 26, 27, 28, 29, 30, 32, 34.—This class of errors are all open to the same objection, namely, that no preliminary foundation was laid to permit the introduction of the testimony complained about. The point made here can be as fairly stated and explained by one illustration as by many; for the obvious reason that the erroneous admission of improper testimony would, within the rule in Mexia vs. Oliver, 148 U. S., 673, be as fatal in one case as in many, because it would be impossible to say that the jury did not act upon the illegal testimony. Not, of course, that I surrender one jot or tittle of the various errors enumerated at the head of this paragraph; but only that, for purposes of convenience in presentation, one illustration will serve my purpose. Take, for example, the testimony of Goodale. From the beginning to the end of his direct examination, the one solitary instance in which market value is mentioned, is when the Government objected to his testimony upon the ground that it did not appear that he knew the market value of the property in dispute on July 6th, 1901. He tells us of his place of residence, his occupation, and the size of the plantation of which he is manager, so far as its planted area is concerned. He tells us that his Plantation is in the district of Waialua, on the Island of Oa-

hu. He tells us that he has had 23 years' experience in this country "in the growth and manufacture of sugar"—be it observed. He says that he is familiar with "the ag-"ricultural land on this Island"; and he tells us, when asked if he knows "the value of it," that he "thinks" so. Up to this point in his examination, no reference has been made to the land involved in this case, or to its market value; and now, for the first time, he is asked whether he knows the land sought to be condemned. Goodale does not pretend that he "knows" the land, and contents himself with saying merely, "I have seen the land." He says that he was there in October, 1901, and it appears from other portions of his testimony that this was the only visit which he ever paid to it (Record, pp. 329, 659). Since October, 1901, he has not been upon the land except as a passenger in the railroad train that crossed it at one point. He was then asked what kind of an examination he made at the time of this visit; and there his preliminary examination as an "expert" abruptly and incontinently ceased. It will be observed that notwithstanding that the vital issue in this case was the market value of the property involved at the time of the taking, yet in this examination of Goodale no reference whatever was made to that subject-matter, and no attempt whatever was made to qualify him upon that essential point. Notwithstanding the utter absence of any foundation—of any qualification—of any showing in the remotest way that he was qualified to speak to the market

value of the leasehold interest involved in this litigation, he was asked the question which appears on pages 328, 658-9, of the Record. To this question the Government interposed the following objection:

> "Mr. DUNNE. Objected to as immaterial, irrele-
> "vant and incompetent; without foundation in this,
> "that it is not a fair statement of the evidence; with-
> "out foundation in this, that it does not appear that
> "the witness does know the market value of such
> "property on the 6th of July, 1901."

This objection was overruled, the Government excepted. And then came before the jury the illegal and damaging testimony, "three hundred thousand dollars." On what principle can this ruling, which is typical of this class of errors, be sustained? Opinion evidence is itself an exception to the general rules of evidence. There is no more familiar principle in the law of evidence than that the opinions of witnesses, except in certain specified, limited and exceptional cases, are irrelevant; for, "if it "were a general rule of procedure that witnesses might "be allowed to state not only those matters of fact about "which they are supposed to have knowledge, but also "the opinions they might entertain about the facts in "issue, the administration of justice would become a lit- "tle less than a farce" (2 Jones, Evidence, sec. 361). And, therefore, it is absolutely without excuse to permit witnesses to give their opinions in evidence except in those

certain specified, limited, and exceptional cases, and not even then, unless the proper foundation is laid by showing that they are qualified to speak to the point in issue. The point in issue, and the only point in issue, was the going market value of the defendant's leasehold interest at the time of the taking; but Goodale was in no manner or form qualified to speak upon this subject. He had visited the land in controversy but once; and, like any other witness, might have been called upon to describe what he saw there; but instead of treating him in this light as a witness simply, his evidence was treated and submitted to the jury as expert evidence of a subject-matter as to which not one thread of foundation was laid. His knowledge of market value in some other neighborhood, even if any such knowledge had been established (which was not done), would not have qualified him to speak concerning the land in controversy; for if he had no knowledge of the going market value of the defendant's leasehold of this particular land, he should have not been allowed to guess from his knowledge of values in some other neighborhood (if such knowledge had been established, which was not done), and then have that guess left for the consideration of the jury as expert testimony. But not only was no showing made of any knowledge by Goodale of market value elsewhere, but also there was no showing, foundation or qualification laid by or for him in the matter of special or peculiar knowledge of market value of the land in controversy. He had visited

the land once; that was the length, breadth and depth of his knowledge of it; and while, as already suggested, he might have testified as an ordinary witness to what he saw on the premises, yet he was not so questioned, he was treated as an expert, and his unfounded and unqualified guess was submitted to that jury as that of an expert in market values. It is earnestly submitted that this error is beyond all remedy. The Supreme Court of Pennsylvania in a very recent and well considered case thus discusses this matter:

> "An expert is a person experienced, trained, "skilled in some particular business or subject. An "expert witness is one who because of the possession "of knowledge not within ordinary reach is specially "qualified to speak upon the subject to which his at-"tention is called. Thus, a chemist, a physician, a "mechanic, an artist, has special knowledge of the "things that fall within the range of his studies and "his daily practice, and because of such special "knowledge, not within ordinary reach, his testi-"mony upon a subject relating to his particular line "of study or research is regarded as most exact and "entitled to more weight than that of witnesses not "possessing the same opportunities for acquiring "thorough knowledge of the subject. Many per-"sons may know something about a given question, "and be competent as witnesses to tell you what they

"know. A few may have an intimate, an exception-
"al, knowledge and be entitled to speak as expert
"witnesses. Now the question to which the so-
"called expert witnesses were called in this case was
"the value of the plaintiff's land before the location
"of the defendant's railroad over it, and its value as
"affected by that location. That they were experts
"in the value of real estate elsewhere did not give
"to their testimony the value of expert evidence
"when they spoke of the plaintiff's property. If they
"had no knowledge of the prices of land in that
"neighborhood before and after the location of the
"railroad, they ought not to be allowed to guess from
"their knowledge of prices in some other neighbor-
"hood, and have such guess left for the considera-
"tion of the jury as expert testimony. Sprogle was a
"witness, but he certainly did not show himself to
"have knowledge not within ordinary reach on the
"subject of the value of the plaintiff's land. He had
"no special or peculiar knowledge of values in that
"neighborhood. He knew enough about the subject
"to be entitled to be heard as any other witness
"might be, but expert knowledge means more than
"that. It was a mistake, therefore, to treat or sub-
"mit to the jury his evidence as that of an expert in
"values in the vicinity in which the plaintiff's land
"was situated. His evidence should have gone with
"that of other witnesses who spoke as witnesses

"simply; or in the language of the learned Judge
"found in the bill of exceptions, 'I think he can tes-
" 'tify as far as his testimony goes.' He might have
"been an expert in values in Philadelphia or Read-
"ing, but he did not show himself to be such as to
"Delaware County. The knowledge relied upon to
"give the testimony of a witness the value of that of
"an expert must relate to the subject under investi-
"gation."

Struthers vs. R. R., 174 Pa. St., 298-9.

It may be claimed that Goodale's position as a plantation manager,—though the manager of a plantation in another neighborhood than the one involved in this case,—might put him in a position to be advised of the going market value of the land in controversy; I dispute the proposition of fact here implied; and I point out that his testimony wholly fails to show that this was so. The very most that could be claimed on this score, allowing the utmost liberality to this defendant, would merely be that Goodale, just like a great many other men, had the opportunity to acquire the requisite knowledge; but neither his testimony nor anything else in the case, even indicates that he improved this opportunity (if the opportunity existed), and acquired the essential knowledge. In addition to this, it is perfectly clear that the mere opportunity for acquiring the knowledge indispensable to permitting the reception of opinion evidence as to market value, cannot suffice; the proper

foundation must be laid by showing the actual existence and possession of such knowledge by the person whose opinion is offered. Thus, the Supreme Court of California remarked:

"The rule is that mere opportunity afforded for "observation will not constitute one an expert, or "render his mere opinion admissible as evidence; he "must have been educated in the business about "which he testifies; or it must first be shown that he "has acquired actual skill and scientific knowledge "upon the subject."

Goldstein vs. Black, 50 Cal., 465.

Estate of Blake, 136 Id. 306, 307.

And see, to the same effect:

Ellingwood vs. Brag, 52 N. H., 490.

Perkins vs. Stickney, 132 Mass., 217.

Page vs. Parker, 40 N. H., 47.

And speaking upon this subject, the Supreme Court of California remarks:

"Conceding that the testimony may have been ad- "missible, the witnesses offered failed to show them- "selves possessed of the requisite knowledge to au- "thorize them to testify as to the value of the land.

" 'Where a witness is produced to testify in the " 'character of an expert, as to the value of the prop- " 'erty, it should appear that he has some special

" 'skill or experience, or peculiar knowledge of the
" 'value of the class of property about which it is
" 'proposed to question him, such skill or knowledge
" 'having been acquired by him in the line of his pro-
" 'fession or business.' (Roger on Expert Testi-
"mony, sec. 154.)

"According to Wharton on Evidence, section 447,
"two essentials are requisite to a proper estimate
"of value:—

" 'First—A knowledge of the intrinsic properties
" 'of the thing.

" 'Secondly—A knowledge of the state of the mar-
" 'ket.

" 'As to such intrinsic properties as are occult
" 'and out of the range of common observers, experts
" 'are required to testify; as to the properties which
" 'are cognizable by an observer of ordinary busi-
" 'ness sagacity, being familiar with the thing, such
" 'an observer is permitted to testify.'

"A witness called upon to give an opinion on the
"subject of value, whether offered as an expert or
"not, must lay a proper foundation for the introduc-
"tion of his opinion, by showing he possesses the
"means to form an intelligent opinion, 'derived from
" 'an adequate knowledge of the nature and kind of
" 'property in controversy, and of its value.'

"We may assume the residence of the witness in
"the vicinity of the property in question, and their

"pursuits, to have given them a reasonable oppor-
"tunity to become acquainted with the nature and
"kind of land in dispute, but it does not follow, and
"their testimony does not show them to possess
"any such knowledge as to its value, as to warrant
"them to give an opinion on that subject.

"There is no doubt that a witness acquainted
"with the value of property may give an opinion as
"such value, but he must first be shown to possess
"the requisite knowledge, and then, although such
"knowledge is not the result of any particular skill
"in a particular pursuit or branch of business, or de-
"partment of science, he may yet be heard. Where,
"however, the knowledge is wanting, the opinion
"should be rejected."

Reed vs. Drais, 67 Cal., 492-3.

And see, to the same effect:

Whitney vs. Boston, 96 Mass., 312.
Haight vs. Kimbark, 51 Iowa, 13.
Daly vs. Kimball Co., 67 Id., 132.
Russell vs. Hayden, 40 Minn., 88.
Terpenning vs. Ins. Co., 43 N. Y., 279.
Beadell vs. R. R., 44 Id., 367.
LaMour vs. Caryl, 4 Den., 373.
Clark vs. Water Co., 52 Me., 68.
Frederick vs. Chase, 28 Ill. App., 215.
Chicago R. R. vs. Mouriquand, 45 Kans., 170.
Omaha Auc. Co. vs. Rogers, 35 Neb., 61.

And the Supreme Court adopts the view of the law for which I am contending:

"The third assignment of error is, that the court "erred in refusing to allow the witness Sabin, intro- "duced in behalf of the defendant, to answer the "question: 'What was the fair rental value per " 'month of this mill and its attachments?'

"This ruling of the court was manifestly proper. "It appears from the testimony of the witness him- "self that he knew of no other silver mill in the "neighborhood of Columbus; that he knew of none "whatever at that time in operation; that he knew "of no silver mill that had been rented at Leadville "or in the State anywhere; and that this was the "first silver mill he had been connected with, though "he had been engaged in mining for twenty years, "and was acquainted with gold mills enough to "know what work they can perform and what they "can earn. He evidently had no such knowledge of "the marketable condition or rental value of such "property as would render his opinion of any use "to the jury beyond the merest guess or conjecture. "His knowledge and experience of mining mills was "such as to render him competent to testify as "to the cost of construction, the value of machinery, "and the expense of putting it up; and upon these "points his testimony was admitted, and was to

"the effect, among other things, that the mill cost "$75,000."

N. Y. Mg. Co. vs. Fraser, 130 U. S., 611.

It is therefore submitted that these errors, of which the Goodale error is taken merely as the type, call loudly for a new trial of this action. At best, expert testimony has been described as unsatisfactory; but it becomes absolutely vicious when it amounts to unloading upon a jury opinions which are not "of any use to "the jury beyond the merest guess or conjecture."

Assignments of Error 38, 39, 40, 41, 42, 43, 44, 45.

Instructions asked for should have been given as asked, when correctly drawn.

People vs. Williams, 17 Cal. 142.
People vs. Eckert, 19 Id., 603.
People vs. Lachenia, 32 Id., 434.

THE VERDICT.

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY VERDICT.

The verdict in this case fixed the value of the leasehold at $94,000; and the value of the "improvements" at $8,523; thus making an aggregate of $102,523. (Record, p. 462-47.) But is is respectfully insisted as follows:

1. There is no evidence anywhere in this Record fixing the value of this leasehold at $94,000.

2. There is no evidence anywhere in this Record fixing the value of these "improvements" at $8,523.

3. Neither of these findings is responsive either to the theory or to the evidence of either side.

The theory of the government was that, by reason of its character and situation, the land condemned was of small value. In support of this theory, the Government offered consistent evidence:

ARCHER: $25 per acre, or $14,025; Record, p. 163, 583-4.

L. L. McCANDLESS: $40 per acre, or $22,440; Record, p. 197-8, 595.

J. A. McCANDLESS: $17½ per acre, or $9,818; Record, p. 227-230, 620-1.

CORP. EXH.: $100,000; Record, p. 613.

TAX RETURN: 1900; $50,000; Record, p. 132-141, 567-571.

TAX RETURN: 1901; $50,000; Record p. 141-4, 571-5.

Of the above six valuations, three (Archer, L.L. and J. A. McCandless) referred to the specific piece of land involved in this litigation; and the average of these three valuations is $15,428.

This average is about one-seventh of the verdict; and it is confidently submitted that a verdict seven times greater than the amount shown by the evidence, is not

responsive to the evidence, does not conform to the evidence, and is not justified by the evidence. The last three of the foregoing estimates are inserted for the sake of completeness, even though that completeness credits the defendant with much more than it is entitled to.

Because the Corporation Exhibit went far beyond the particular land involved in this case, and included in the $100,000 all of the entire landed interests of the defendant, both in fee and in leasehold; while the Tax Return for 1900 included 4,720 acres of leasehold land, or about eight times the land involved in this case; and the Tax Return for 1901 included 4,770 acres of leasehold land, or about eight times more than is involved in this case. But even giving the defendant the full benefit of these last valuations, the average of the entire six valuations would only be $41,381,—or, not one-half of the amount found by the verdict.

The theory of the defendant was that the land condemned was of great value; and the defendant introduced evidence in line with that theory:

LOW: $400,000; Record, p. 288-9; 635-6.
GOODALE: $300,000; Record, p. 328-9; 658-9.
MEYER: $300,000; Record, p. 348; 667-8.
BOLTE: $275,000; Record, p. 267-9; 628-9.
AHRENS: $275,000; Record, p. 355-6; 670-1.
THURSTON: $256,500; Record, p. 373-4.

CASTLE: $250,000; Record, p. 318; 652.
RENTON: $250,000; Record, p. 340-1; 664-5.
MORGAN: $175,000; Record, p. 367; 677-8.
ANSWER: $144,945; Record, p. 39.

The average of these ten valuations is $262,645,—an amount vastly greater than double the amount fixed by the verdict. A comparison of these values reveals the most startling differences; it is simply impossible to predicate reliability of any one of them; and "The wide "conflict in the testimony of defendant's witnesses shows "upon what an unsubstantial and conjectural basis they "rest."

U. S. vs. Seufert, 87 Fed. Rep., 40.

It is thus perfectly plain that this jury, in framing this verdict, did not conform to the evidence on either side, but decided the case wholly outside the evidence. The verdict was not responsive to the evidence for the Government; it was considerably over double the value shown by that evidence; if that were the only evidence in the case, the verdict would have ben denounced as wholly without, and unjustified by, the evidence; and since this verdict, even upon the most liberal allowances to the defendant, was more than two times in excess of the average of the Government's estimates, it is perfectly plain that the jury did not conform to the evidence produced by the Government.

But although the jury were undoubtedly greatly influenced by the extravagant estimates of the defendant, yet their verdict was not one-half of what it might have been, had they fully accepted those estimates as their guide; none of them were fully accepted.

It is impossible to say that this jury acted upon either line of evidence; the verdict establishes a clear departure from the evidence; it is not justified by the evidence on either side. This jury was limited in their disposition of this case to the evidence duly received, and to that only; they could base no finding on what they saw at the view of the premises; the charge of the Court prohibited that. In charging the jury the Court observed:

> "If in the course of this trial the Court has by "word or expression appeared to favor one side "more than the other, it is not intended, it is the duty "of the Court, and is its aim, and it should be the "duty of the Jury to do absolute justice between the "parties in this as well as in all other actions, and "you are simply to take the law from the Court and "confine yourselves solely to a consideration of the "testimony produced in the case in arriving at a "verdict without limiting your consideration to any "isolated portion of the testimony, but considering "it as a whole, fairly weighing all the testimony,

"both the direct and indirect evidence, with all "reasonable inferences to be drawn therefrom."

Record, p. 454.

"Gentlemen of the Jury, during the trial you vis- "ited the lands sought to be condemned—the object "of such visit was that you might familiarize your- "selves with the nature and extent of the land and "its physical characteristics and conditions, so as "to better enable you to understand the evidence on "the trial of the case. The knowledge so acquired "may be used by you in determining the weight of "conflicting testimony respecting the value of the "leasehold interest in those lands, but not other- "wise; the Court instructs you that there is no "testimony in the case as to the value of the ar- "tesian well on said premises. You will therefore "not give the matter of this well any consideration."

Record, p. 456-7.

These expressions of opinion are fully supported by the books:

Laflin vs. R. R., 33 Fed. Rep. 415, 424.
McQueen vs. Mechanics' Inst., 107 Cal., 163.
Tully vs. Fitchburg R. R., 134 Mass., 499.
Davis vs. Henney, 1 Metc. (Mass.), 221.

In the California case just cited, it was argued for the appellant that:

"The Court so used its discretion when it granted "a new trial on the ground of insufficiency of evid- "ence, as the testimony the jury obtained in its visit "to and examination of the premises may have been "the basis of the verdict."

But the Court met this argument in the following manner:

"The purpose of allowing the Jury to visit the "premises was to enable them to understand the "evidence introduced on the trial. Upon such evid- "ence we must presume their verdict was based. "The fact that the jury was allowed to visit the "premises cannot deprive the court of its jurisdic- "tion to grant a new trial. This it should do not- "withstanding a conflict in the evidence, if fully con- "vinced that the verdict was wrong."

McQueen vs. Mechanics' Inst., supra.

These suggestions are in line with the settled rule that the verdict must be based upon and conformed to the evidence, and that where the verdict cannot be justified upon any reasonable hypothesis presented by the evidence, it should obviously be set aside. Thus, if a suit were brought to recover a chattel, the value of which the plaintiff offered evidence to show was $100, and the defense was that the defendant was out of the jurisdiction at the time of the taking, and the jury

should return a verdict for the plaintiff for the value of $50, such a verdict, of course, would not be allowed to stand; for it would neither conform to the plaintiff's evidence, nor to that of the defendant. There would be no hypothesis of fact upon which the verdict could be justified; it would be a verdict without evidence to support it; and it is not to be tolerated that the jury should thus assume, in disregard of the law and the evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim. Indeed, the Supreme Court of California defines "substantial justice" to be "such justice as the law administers when correctly ap-"plied, and not such as may be dictated by the abstract "and varying notions of an individual as to what the "equities of the case may be."

Stringer vs. Davis, 30 Cal., 322.

The position here taken is amply sustained by authority:

Campbell vs. Jones, 38 Cal., 507.
People vs. Knutte, 111 Id., 453.
Bucki vs. Seitz, 39 Fla., 55; 21 So., 576.
Sinclair vs. Hewitt, 102 Geo., 90; 29 S. E., 139.
Ford vs. R. R., 69 Iowa, 627; N. W. 587; 29 Id.,755.
Wilson vs. Ins. Co., 70 Iowa, 91; 30 N. W., 22.
Casey vs. R. R., 84 Ky., 79.
Bank vs. Armstrong, 92 Mo., 265; 4 S. W. 720.

R. R. vs. Wallen, 65 Tex., 568.
U. S. vs. Seufert, 78 Fed. Rep., 524.
Felton vs. Spiro, 78 Fed. Rep., 576.
Wright vs. S. Exp. Co., 80 Id., 85, 98.
Ulman vs. Clark, 100 Id., 180.
Pleasants vs. Fant, 22 L., 780.
Metropolitan R. R. vs. Moore, 30 Id., 1024-5.

The nature and cause of the mistake of the jury are alike immaterial; in other words, it is wholly immaterial by what process the erroneous result was reached. And thus, the affidavits of jurors explaining the grounds of their verdict will not be considered.

14 Ency. Pl. & Pr., 777-8.
Chandler vs. Thompson, 30 Fed. Rep., 38, 45.

"Where the trial judge expresses the opinion that "the verdict is clearly against the weight of evi- "dence, it is his imperative duty to grant a new "trial. In such case, he should not defer his opinion "to that of the jury or render a judgment to ascer- "tain the opinion of the appellate court. If he re- "fuses to set aside the verdict, a new trial will be "granted by the appellate court for abuse of dis- "cretion. * * * When a verdict is clearly "against the weight of evidence, it is the duty of the "court to set it aside and order a new trial. This is "an imperative duty, and cannot be evaded on the

"theory that the jurors are exclusive judges of the "questions of fact and that the evidence can be "weighed on appeal."

14 Ency. Pl. & Pr., 770-1, 776-7.
Zantzinger vs. Weightman, 2 Cranch, C. C., 478.
Wilson vs. James, 3 Blatch., 227.
Slocomb vs. Lurty, Hempst. (U. S.), 431.

And here there is a substantial similarity between the trial in which the verdict was set aside, and the present trial.

Affidavit; J. J. Dunne, Record, p. 502.
Thatcher vs. Gottlieb, 54 Fed. Rep., 312.

Substantial similarity between the two trials:

Affidavit: J. J. Dunne, Record, p. 502.
Thatcher vs. Gottlieb, 54 Fed. Rep., 312.

Former adjudication by Estee, J.;

See Opinion in Motion for a New Trial; Record, p. 508.

This ruling in res adjudicata as to the matters involved;

21 Am. & Eng. Ency., 1st Ed., 240, 252.
1 Van Fleet, Former Adjudication, secs. 14, 18.
Hawk vs. Evans, 76 Iowa, 593.

For all of the foregoing reasons, this verdict is against

the law and the evidence. For a verdict is contrary to law when it is founded on insufficient evidence; and a new trial will be granted on this ground where the evidence of one party is not sufficient to support the verdict, or where there is no evidence to support it, or where the verdict is insufficient to establish a material fact.

> 14 Ency. Pl. & Pr., 782-3, and notes.
> Walker vs. Smith, 1 Wash., 152.
> Dow vs. Wells, 11 Fed. Rep., 132.
> Crookshank vs. Fourth Nat. Bank, 26 Id., 584.
> S. P. R. R. vs. Hamilton, 54 Id., 468.
> Vallance vs. B. R. R., 55 Id., 364.
> Pleasants vs. Fant, 22 L., 780.

EXCESSIVE VERDICT.

Having rejected the defendant's estimates of value as extravagant, the jury were left with nothing but the evidence of the Government to base a verdict upon. But, as referred to this evidence, the finding was as extravagant as the rejected estimates. While the former adjudication by the court in this case is conclusive upon this point, yet a brief quotation from a recent case in this Circuit may be of value, in view of the reasoning hereinabove advanced;

> "I am also of the opinion that the compensation "awarded by the verdict is excessive, and the motion "for a new trial should be allowed on that ground.

"It is argued that all the witnesses who testified as "to value placed the amount above that found by "the jury, and that there is no contradiction of this "testimony. None of these witnesses estimated de- "fendant's damages at less than $100,000, and some "of them placed the damages at $150,000. These "amounts are so far above what was found by the "jury that it is apparent they could not have re- "garded this testimony. It was mere opinion evid- "ence, based in large part upon conjecture. In "arriving at their verdict, the jury must have dis- "regarded the opinions of these witnesses, and form- "ed their own opinions from the facts in evidence, "and these facts do not, in my judgment, warrant "the finding made. In as much as there must be "a new trial upon the other grounds mentioned, it "is unnecessary to comment upon these facts. The "motion for a new trial is allowed."

U. S. vs. Seufert, 78 Fed. Rep., 520, 524.

VERDICT AGAINST CHARGE OF COURT.

This is true generally, as the verdict shows; but it is particularly true of Subd. (d), which reads;

"In arriving at said verdict, said jury was neither "guided nor governed by the preponderance of the "evidence."

In the opinion of the lower Court, heretofore rendered in this case, upon a similar state of facts, that Court observed;

> "The principal question involved in the motion in "the judgment of the Court is as to the verdict be- "ing excessive in amount, and not borne out by the "weight of the evidence. It is presumed that the "jury intended to be controlled in fixing the value "of the leasehold interest in the lands by a pre- "ponderance of the evidence; but in the judgment of "the Court, they failed to do this." Record, p. 508-9.

The Court then discusses at length the evidence in the case, and sums up the situation thus:

> "However, upon a careful consideration of the "reasons advanced both for and against the motion "made by the plaintiff, and after a lengthy exam- "ination of the whole of the record including the "testimony offered on behalf of both parties and "of the able briefs filed herein, I am of the opinion "that the amount of the verdict rendered by the "jury is excessive, and not in conformity with the "weight of the evidence."
>
> Record, p. 512-3.

And it must be borne in mind that the cause in which this opinion was rendered was the same cause now being heard; the pleadings were identical; the evidence

was substantially similar, as affirmatively appears from the uncontradicted affidavit of J. J. Dunne which is made a part of this Record; and that the difference in amount between the two verdicts is a difference to which clearly applies the maxim de minimis non curat lex.

THE MOTION FOR A NEW TRIAL.

It will be remembered that, at the proper time, the Government made its motion for a new trial in the court below. This motion was denied, the Government excepting. The opinion of the Court in this behalf is printed in the record (p. 519-522). An examination of this opinion will show that the Court neither weighed all the evidence, nor exercised its discretion to say whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted; the Court below did not accord to the Government its right to have all the evidence weighed, and to have the discretion of the Court duly exercised; and the Court disposed of the motion by saying, in effect, that he felt concluded by the doctrine of concurring verdicts. The exception of the Government was objected to by the Plantation Company purely upon the ground that the order denying the motion for a new trial was not the subject of exception, because not reviewable on appeal; and notwithstanding that the attention of the Court below was specifically directed to the point of the ex-

ception, the objection was sustained and the exception eliminated from the Bill of Exceptions. This is one of the matters in which the Government seeks to correct the Bill of Exceptions. Independently of this, the complaint of the Government is registered in Assignments of Errors No. 46 and 47.

In all this, it is submitted, the lower court erred. In the Federal Courts, the law and procedure of new trials are not modified or affected by state legislation. Such Courts follow the common law both as to the grounds for a new trial and the procedure. The trial courts are free to exercise their discretion in granting or refusing new trials, and such orders are not subject to review by error or appeal. The rule seems to be that, in the Federal Courts, the granting or refusal of a new trial is addressed to the discretion of the court, and is not the subject of review. 14 Ency. Pl. & Pr., 837, 955-6, and notes.

It is just precisely because the ruling of the court upon a motion for a new trial is not the subject of review, that it is so important and responsible a function of the trial courts; and it is just because there is no provision for review by error or appeal, just because the trial court holds the litigant and his estate and his rights in the hollow of its hand,—that the greatest of circumspection and nicest care should be bestowed upon the decision of such motion; and, as will be gathered

from the cases hereafter to be cited, this is the view of the matter taken by the federal judges.

It is said that motions of this character are addressed to the "discretion" of the court, and that is so. But the discretion here meant, does not include whim or caprice; it is not mere arbitrary will; it means a sound legal discretion only, to be exercised in conformity with, and in subordination to, the rules and analogies of the law; and the courts have uniformly held that the discretion which finds play in emergencies similar to that presented here, is not an arbitrary caprice governed by no rules and disposing of the rights of litigants according to whim. Lord Coke defines discretion as

> "Science or understanding to discern between
> "falsity and truth, between wrong and right, be-
> "tween shadows and substance, between equity and
> "colorable glosses and pretences, and not to be ac-
> "cording to their wills and private affections."
>
> Rook's case, 5 Coke, 100b.

The views of Lord Mansfield were thus stated:

> "Judicial discretion, when applied to a court of
> "justice, means sound discretion, guided by law. It
> "must be governed by rule, not by humor. It must
> "not be arbitrary, vague, and fanciful, but legal and
> "regular."
>
> Rex vs. Wilkes, 4 Burr, 2539.

And the views of Chief Justice Marshall are thus quoted in a leading New York case:

> "Judicial discretion is a phrase of great latitude;
> "but it never means the arbitrary will of the judge.
> "It is always (as Chief Justice Marshall defined it)
> " 'a legal discretion to be exercised in discerning the
> " 'course prescribed by law; when that is discerned,
> " 'it is the duty of courts to follow it. It is to be
> " 'exercised, not to give effect to the will of the
> " 'judge, but to that of the law.' "
>
> Tripp vs. Cook, 26 Wend., 152.

I cite the following California definition for the sake of its clearness:

> "The discretion intended is not of a capricious or
> "arbitrary discretion, but of an impartial discre-
> "tion, guided, and controlled in its exercise by fixed
> "legal principles. It is not mental discretion, to be
> "exercised, ex gratia, but a legal discretion to be
> "exercised in conformity with the spirit of the law,
> "and in a manner to subserve and not to impede or
> "defeat the ends of substantial justice."
>
> Bailey vs. Taafe, 29 Cal., 424.

The foregoing conception of judicial discretion, particularly as applied to the granting or denying of the motion for a new trial, is amply supported by authority:

> 9 Am. & Eng. Ency., 2nd Edition, 473-4.

Faver vs. Bruner, 13 Mo., 543.
State vs. Cummings, 36 Id., 279.
Maybry vs. Ross, 48 Tenn., 769.
Lybecker vs. Murray, 58 Cal., 189.
Stringer vs. Davis, 30 Id., 322.
Purington vs. Frank, 2 Iowa, 565.
State vs. Painter, 40 Iowa, 298.
Ex parte Marks, 49 Cal., 681.
N. G. Banks, vs. Caldwell, 8 N. Y. Sup., 380.
Carter vs. Wharton, 82 Va., 264.
Harries vs. Roebuck, 47 H. J. L., 228.
Wright vs. Lacy, 22 Minn., 466.

It is thus plain that while motions for a new trial in the federal courts may be said to be addressed to the "discretion" of the Court, still two conditions must concur; first, that "discretion" must be exercised; and secondly, that "discretion" is no vain or willful thing, but is circumscribed and limited by a settled legal theory. This subject was very ably discussed in a recent opinion in the Circuit Court of Appeals for the Sixth Circuit, where Taft, Circuit Judge, said:

"A motion for a new trial is, of course, addressed "to the discretion of the court, and, if the court "exercises its discretion, and either grants or de-"nies the motion, its action is not the subject of re-"view. This is so well settled that it is unneces-"sary to cite authorities upon the point. But the

"motion for new trial is a remedy accorded to a "party litigant for the correction by the trial court "of injustice done by the verdict of a jury. It is "one of the most important rights which a party to "a jury trial has. It is a right to invoke the dis-"cretion of the court to decide whether the injus-"tice of the verdict is such that he ought to have "an opportunity to take the case before another "jury. If, now, in exercising this discretion, it is "the duty of the court to consider whether the ver-"dict was against the great weight of the evidence, "and he refuses to consider the evidence in this "light on the ground that he has not power or "discretion to do so, it is clear to us that he is "depriving the party making the motion of a sub-"stantial right, and this may be corrected by writ "of error. . . . The defendant receiver, therefore, is "entitled to have the court below weigh all the evi-"dence, and exercise its discretion to say whether "or not, in its opinion, the verdict was so opposed "to the weight of the evidence that a new trial "should be granted, and the judgment of the cir-"cuit court must be reversed for this purpose."

Felton v. Spiro, 78 Fed. Rep. 576, 581, 583.

An examination of the opinion of the Court below, however, will indicate very plainly that that court did not "weigh all the evidence," nor did it "exercise its

discretion"—not its whim, but its discretion—in such an analysis of the evidence as to be able "to say "whether or not, in its opinion, the verdict was so op- "posed to the weight of the evidence that a new trial "should be granted." In all this, it is submitted that the lower court grievously erred. The position taken amounted substantially to this: "I will not weigh this "evidence because, whatever I may think about it, I "am confronted by two verdicts substantially the same, "and I am therefore precluded from allowing a new "trial herein." In effect, this was the mental attitude of the court below. It sought to avoid the analysis of the evidence by setting up the doctrine of concurring verdicts; and the opinion substantially says so (Record, p. 522). This, however, operated a denial of rights to which the appellant was entitled, and of the deprivation of which it was authorized to complain.

Something may be said here concerning the number of new trials which the court may grant; but in the consideration of this subject-matter, two things should be kept steadily in view—first, whether there is in existence any statute regulating the matter; and second, whether any authority cited was controlled or influenced by any such statute. In many states the number of new trials which may be granted to one party is limited by statute, as in Illinois, Indiana, Missouri, Mississippi, Tennessee and other States. The object of such statutes is to make concurrent verdicts of differ-

ent juries conclusive on questions of fact, although not approved by the judge; but such statutes have no application where errors of law have intervened. Nor do such statutes apply to appellate courts: a new trial granted by the appellate court is not to be counted as a new trial within the number restricted.

In the absence of statutory prohibition, there is no limit to the number of new trials which may be granted in a cause upon proper grounds. A new trial should be granted as often as prejudicial errors are committed and excepted to; and this is the rule where errors of law have occurred at each trial, it being the duty of the court to grant a new trial as often as the verdict is erroneous.

R. R. vs. Nash, 12 Fla. 497.
University vs. Broadfield, 30 Geo., 1.
Clark vs. Jenkins, 162 Mass., 397.
State vs. Horner, 86 Miss., 71.
Wilkie vs. Roosevelt, 3 John. Cas., 206.
Wilson vs. Gordon, 20 Tex. 568.
Parker vs. Ansel, 2 W. Bl., 963.
Berks Co. vs. Ross, 3 Minn. 520.
Van Blarcom vs. Kipp, 26 N. J. L., 351.
Ross vs. Ross, 5 B. Mon., 20.
Moore vs. Cherry, 1 Bay, 269.
Nun vs. Perkins, 1 S. & N., 412.
Jackson vs. McMurry, 4 Colo. 76.

Coffin vs. Ins. Co., 15 Pick., 291.

Van Doren vs. Wright, 65 Minn. 80.

A full examination of the subject will, in my opinion, make clear that the courts everywhere agree that wherever errors of law have intervened (as they have most greviously intervened in this cause) a new trial will be granted as often as such errors were committed and excepted to.

There is no statute of the United States, with which I am familiar, regulating this subject-matter; and, almost as a consequence, the federal courts seem to have fallen into hopeless conflict upon this subject. A few illustrations may serve the useful purpose of showing that, whatever this conflict may amount to, yet this circuit, according to its latest expressions of opinion, follows the general rule above adverted to as obtaining in the absence of statutory prohibition.

Johnson vs. N. P. R. R., 46 Fed. Rep., 347. In this cause two verdicts were set aside, as appears from the statement of Judge Hanford at page 349. It will be observed that neither statute nor authority is cited, and that the language is very carefully limited to "this particular cause."

Joyce vs. Charleston Ice Co., 50 Fed. Rep., 371. In this case, also, no pretense of statutory authority can be found; and the court, apparently, is deciding the case upon his personal conceptions. It is significant,

however, that no errors of law are apparent in the record; and thus the cause becomes differentiated from that at bar.

Linws vs. C. & O. R. R., 91 Fed. Rep., 964. This cause may be dismissed with the observation that it is distinguishable from the cause at bar in that there were no errors of law. Neither here nor elsewhere, has any judge ever claimed that where errors of law intervene, the rule of concurrent verdicts would be applied.

Hodge vs. Lehigh Valley R. R., 56 Fed. Rep., 195. This cause can scarcely be regarded as being in point. The pleadings were amended; and the evidence varied —indeed, the face of the litigation was changed. Nevertheless, the report shows that the verdict was vacated.

Clear) vs. Fox, 26 Fed. Rep., 90. The syllabus of this case, which was a circuit court case, reads thus:

> "A court will set aside a verdict as contrary to "the law and evidence as often as considerations "of justice may seem to demand. Where one jury "found a verdict for $15,000, which was set aside, "and another jury found a subsequent verdict in "the same case for $9,500, this latter verdict was "set aside."

'n the opinion the court refers to the "exceptionally

"intelligent juries" who have passed on the case; and in concluding his opinion, the judge remarks:

> "As a short and easy way of getting rid of person-
> "al trouble, and avoiding the discharge of an un-
> "pleasant duty, I might let it (the verdict) stand,
> "throwing the responsibility on the jury. But I
> "should always feel that I allowed injustice to be
> "done, and the legal rights of a stranger to be vio-
> "lated. On the broad ground that the verdict is
> "contrary to the law of the case, and does not do
> "justice between man and man, it must be set
> "aside."

Wright vs. Southern Express Co., 80 Fed. Rep., 85. In this case the court remarked:

> "Notwithstanding there have been two verdicts in
> "this case in favor of the plaintiff, the court is con-
> "strainedly of the opinion that the jury may be en-
> "tirely wrong in its finding that there has been any
> "substantial injury to the plaintiff by reason of that
> "which occurred on the occasion of which she com-
> "plains. It would be sufficient, and probably it
> "would be best, for the court to go no further than
> "to announce its disapproval of the verdict in this
> "regard; but I think it is due to the parties, if not
> "to the court itself, that some explanation should be
> "made of this dissatisfaction on the part of the
> "court. The information is that the former verdict

"was set aside by the learned judge then presiding "because of a similar discontentment of this point, "and there being two verdicts in favor of the plain-"tiff only adds to the embarrassment that the court "now feels in granting a new trial. Notwithstand-"ing that embarrassment, I am not contended to let "the verdict stand.

"It may be asked, as it was suggested in argument, "why the court did not direct a verdict as requested "by the defendant company, if it takes the views "that the proof was not sufficient to sustain the "verdict. Unquestionably this case is not one for "the direction of a verdict, but, on the contrary, is "distinctly a case which ought to be submitted to a "jury. But it does not follow, because it ought to "be submitted to a jury, that the court should let "the verdict stand, not even two verdicts, possibly "not three or more, if at each succeeding trial the "proof should be precisely the same and no strong-"er for the plaintiff at the last than at the first trial. "The case of Railway Co. vs. Lowerey, 20 C. C. A., "596, 74 Fed., 463, makes, and was intended to make, "this distinction entirely clear, and there could be "no more pertinent illustration of the distinction it-"self than that furnished by the case we have in "hand. Here, as will directly appear, there was not "only the testimony of the plaintiff herself as to "the extent of her injuries, but it was supported by

"that of the expert physicians introduced in her be-
"half. It would be a plain usurpation on the part of
"the court to direct a verdict on such a state of the
"proof, and yet the duty of the trial judge to
"scrutinize the proof, and determine, on an applica-
"tion for a new trial, whether the verdict should
"stand, is just as plain. It is as much a part of the
"right of trial by jury to have the court exercise this
"function of inspecting the verdict after it is ren-
"dered, as it is to have the 12 men hear the testi-
"mony and try the fact. The time might come when
"it would be the duty of the court to yield even to
"the perversities of the jury, and not any longer in-
"terfere with their verdict, but two verdicts are not
"ordinarily conclusive of that duty. Three verdicts
"have sometimes been thought sufficient to invoke
"the duty of non-interference, and by statute in
"some of the states that has been made the rule of
"judgment. * * * On another trial it may be
"that the facts and circumstances will show that
"the plaintiff has been injured by that which oc-
"curred at the Express Office, and I am well aware
"of the fact that I am assuming a grave responsi-
"bility in setting aside a verdict which is the sec-
"ond in the plaintiff's favor; that I am in some dan-
"ger of trenching upon the right of the plaintiff to
"have the weight of this proof determined by the
"jury, and not by me; but the law commits this re-

"sponsibility to the hands of the trial judge for the
"very purpose of protecting parties from what may
"seem to be unjust verdicts; and so I must accept
"that responsibility, give expression and effect to
"my decided conviction that the proof does not sus-
"tain the verdict, and that it is an injustice to the
"defendant company to permit it to stand as a rea-
"sonable verdict on such proof as we had at the
"trial. I could not direct a verdict for the defend-
"ant, yet I expected the jury on the proof, and the
"instructions given as to the law, to find for the
"defendant, and the contrary action was a surprise
"to me. I mention this merely to show the strength
"of the conviction I have that the verdict of the
"jury was not according to the weight of the testi-
"mony, and I can see in the case enough of opportun-
"ity to be misled by undue sympathy to account for
"it. It is better to submit the question to another
"jury. New trial granted."

United States vs. Taffe, 78 Fed. Rep., 524. I call attention to this case as being the latest expression of opinion upon this subject in this circuit; and as being, also, an eminent domain case. Judge Bellinger states his understanding of the rule thus:

"It is further urged against the motion that
"there have been two concurring verdicts in this
"case, and that the court is not authorized to grant

"a motion for a new trial in such a case. There is "no rule which precludes this court from granting "a motion to set aside a second verdict where there "have been two concurring verdicts."

For all the considerations hereinabove advanced, it is respectfully submitted that the judgment herein should be reversed, and the cause remanded for a new trial.

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